

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

No. 77-6056

77-6056

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARILYN YOUNG, et al.,

Plaintiffs-Appellants,

v.

BROCK ADAMS, et al.,

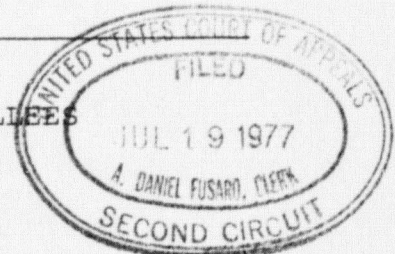
Defendants-Appellees

B

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES



Of Counsel:

PETER C. DORSEY
United States Attorney for
the District of Connecticut

ROBERT W. BATCHELDER
Acting Assistant Chief
Counsel

FRANK SANTORO
Assistant United States Attorney
P.O. Box 1824
270 Orange Street
New Haven, Connecticut 06508

GLENN F. WASSERMAN
Attorney-Advisor

DAVID C. SHILTON
Attorney-Advisor
Urban Mass Transportation
Administration
400 7th Street, S.W.
Washington, D.C. 20590

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STATEMENT OF THE CASE

On May 12, 1976, the plaintiffs, two handicapped residents of the State of Connecticut, brought this class action seeking to enjoin the State of Connecticut from purchasing the Connecticut Company and Orange Street Bus Line Company and purchasing 280 new buses, using Federal funds granted by the Urban Mass Transportation Administration (UMTA). Plaintiffs alleged that the new buses the State intended to purchase would be inaccessible to non-ambulatory handicapped persons.

The plaintiffs filed Motions for a Temporary Restraining Order and for a Preliminary Injunction and a Motion for Class Certification, and defendants filed Motions to Dismiss or in the alternative, for Summary Judgment.

A hearing on plaintiffs' Motion for a Temporary Restraining Order was held on May 24, 1976, and May 25, 1976, at which time plaintiffs' Motion for a Temporary Restraining Order was denied. The state defendants then proceeded to purchase the bus companies using state and federal funds.

Hearings on plaintiffs' Motion for Preliminary Injunction and on defendants Motions to Dismiss or for Summary Judgment, concerning the planned purchase of 280 new buses, were held on June 28, 1976, July 6, 1976 and on July 7, 1976.

On December 17, 1976, the court granted the defendants' Motion for Summary Judgment, and a judgment was entered on Jan. 10, 1977. Thereafter, on March 7, 1977, the plaintiffs filed a notice of appeal.

STATUTES INVOLVED1. Urban Mass Transportation Act of 1964 as amended

PLANNING AND DESIGN OF MASS TRANSPORTATION FACILITIES TO MEET SPECIAL NEEDS OF THE ELDERLY AND THE HANDICAPPED.

SECTION 16. (a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services: that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

(b) In addition to the grants and loans otherwise provided for under this chapter, the Secretary is authorized to make grants and loans--

(1) to States and local public bodies and agencies thereof for the specific purpose of assisting them in providing mass transportation services which are planned, designed, and carried out so as to meet the special needs of elderly and handicapped persons, with such grants and loans being subject to all of the terms, conditions, requirements, and provisions applicable to grants and loans made under section 1602(a) of this title and being considered for the purposes of all other laws to have been made under such section; and

(2) to private nonprofit corporations and associations for the specific purpose of assisting them in providing transportation services meeting the special needs of elderly and handicapped persons for whom mass transportation services planned, designed, and carried out under paragraph (1) are unavailable, insufficient, or inappropriate, with such grants and loans being subject to such terms, conditions, requirements, and provisions (similar insofar as may be appropriate to those applicable to grants and loans under paragraph (1)) as the Secretary may determine to be necessary or appropriate for purposes of this paragraph.

Of the total amount of the obligations which the Secretary is authorized to incur on behalf of the United States under the first sentence of section 1603(c) of this title, 2 per centum may be set aside and used exclusively to finance the programs and activities authorized by this subsection (including administrative costs).

(c) Of any amounts made available to finance research, development, and demonstration projects under section 1605 of this title after October 15, 1970, 1-1/2 per centum may be set aside and used exclusively to increase the information and technology which is available to provide improved transportation facilities and services planned and designed to meet the special needs of elderly and handicapped persons.

(d) For purposes of this chapter, the term "handicapped person" means any individual who, by reason of illness, injury, age,

congenital malfunction, or other permanent or temporary incapacity or disability, is unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected. (49 U.S.C. §1612).

2. Rehabilitation Act of 1973

NONDISCRIMINATION UNDER FEDERAL GRANTS

Section 504. No otherwise qualified handicapped individual in the United States, as defined in section 706 (6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (29 U.S.C. §794).

ISSUES

1. Was the District Court correct in ruling that the defendants' efforts to accomodate the needs of handicapped persons were legally sufficient under applicable statutes and the United States Constitution?
2. Was it proper for the District Court to grant defendants' Motion for Summary Judgment?

STATEMENT OF THE FACTS

The program of federal assistance to urban mass transportation systems, authorized by the Urban Mass Transportation Act of 1974, as amended, (hereinafter UMT Act) is administered by the Department of Transportation pursuant to Reorganization Plan No. 2 of 1968. 1/

1/ 33 Fed. Reg. 6965 (June 30, 1968); 82 Stat. 1369.

All of the powers of the Secretary of Transportation under the UMT Act and related laws pertaining to such assistance have been delegated to the Administrator of UMTA. 2/

On January 12, 1976, the Connecticut Department of Transportation (CDOT) submitted an application to UMTA for a capital assistance grant. The project described in the application consisted of the purchase of two private mass transportation companies serving the Hartford, New Haven and Stamford metropolitan areas, 270 new 49-53 passenger, air conditioned, standard-size, diesel suburban buses, maintenance equipment and vehicles, fareboxes, two-way radios, rehabilitation of facilities, spare parts and related items. The net project cost of this project was estimated to be \$34,585,990 and the requested federal share of the project was \$26,660,952, or 80 percent. 3/

The two private transportation companies proposed for acquisition had been running large deficits, and the State of Connecticut had been subsidizing operating expenses for several years. The bus fleets were old and frequently broke down. The purpose of the proposed project was to maintain the service being offered by these companies, while upgrading the bus fleets through replacement of the oldest vehicles. In addition, the total number of buses available for service would be increased by 69. 4/

2/ 49 CFR §1.50.

3/ Approval memorandum of May 12, 1976, attached to Affidavit of Robert E. Patricelli, hereinafter "Patricelli Affidavit", submitted to the District Court, pp. 1-2 (Attachment "A" to this Brief).

4/ Id. at p.5.

Pursuant to usual UMTA procedures, an approval memorandum dated May 12, 1976, was sent from then Associate Administrator for Transit Assistance Jerome Premo to then Administrator Patricelli, recommending approval of the project. The memorandum noted that the buses provided for in the grant would be equipped with special features to make them more readily usable by the ambulatory elderly and handicapped. Such features included non-skid flooring, extra vertical stanchions, and lighted stepwells. The buses would not, however, be equipped with wheelchair lifts. 5/

The approval memorandum mentioned a companion project, not yet approved by UMTA, to provide four 12-passenger vehicles for elderly persons in Hartford. 6/ The memorandum also mentioned studies underway in New Haven and Stamford regarding "setting up a structure to coordinate (Elderly and Handicapped) Services in the urban areas," and a study in Hartford which had identified two possible alternatives for aiding elderly and handicapped persons. 7/ The approval memorandum recommended:

"that this grant be conditioned upon the timely amendment of the Hartford, New Haven and Stamford TDP's (Transit Development Plans) to include special efforts to provide to the elderly and physically handicapped mass transportation services which they can effectively use and upon submission, within twelve months, of one or more applications for capital assistance to begin implementation thereof." 8/

5/ Id.

6/ See also Transcript at 170, 173.

7/ One of these alternatives, a proposal to provide lift-equipped vans for door-to-door service is described in testimony at Tr. 243, 286, 287, 292; later versions of the proposal include 7 rather than 17 lift-equipped vans.

8/ Approval Memorandum, supra, at p. 5.

The grant for this project was approved by then UMTA Administrator Patricelli for the requested amount of \$26,660,952 on May 12, 1976. A grant contract was executed on May 14, 1976. It contained the following condition:

"Special Condition - The Public Body shall as a condition of this Grant, proceed with all reasonable speed to amend the Transit Development Plans for the Hartford, New Haven, and Stamford areas to include specific special efforts to provide to elderly and handicapped persons mass transportation service which they can effectively use, pursuant to UMTA Regulations appearing in 41 F.R. 18234 et seq. (April 30, 1976), and shall, within 12 months from the date of this Contract, submit one or more applications for capital grant assistance to implement such amendments." 9/

Prior to applying for this grant, CDOT had applied for and received a grant under section 16(b)(2) of the UMT Act for purchase of approximately 24 vehicles and related equipment to meet the mass transportation needs of elderly and handicapped persons in Connecticut. This grant was approved by UMTA on June 30, 1975, and \$261,000 of Federal funds (80 percent of project cost) were made available. CDOT provided the remaining 20 percent of project cost. The 24 vehicles were to be operated by private non-profit agencies. Pursuant to this program, 6 vehicles which could accomodate wheelchairs were made available to the Hartford, New Haven and Stamford areas. At the same time, CDOT was planning for a second project under section 16(b)(2), and UMTA had allocated and set aside \$283,000 for use in Connecticut upon approval of applications submitted by private non-profit agencies. 10/

9/ UMTA Capital Grant Contract, Part I, p. 1a; attached to Patricelli Affidavit.

10/ Patricelli Affidavit, para. 11.

Prior to the approval of this grant UMTA had published in the Federal Register of April 30, 1976, final regulations (hereinafter UMTA's elderly and handicapped regulations), concerning "Transportation for Elderly and Handicapped Persons." 11/ The regulations became effective on May 31, 1976, two and one-half weeks after the grant approval of May 12. 12/ The regulations set forth comprehensive planning requirements, service requirements, and equipment standards designed to make regular transit service more accessible to ambulatory elderly and handicapped persons, and to increase significantly the level of service for wheelchair users and others who cannot negotiate steps.

On August 2, 1976, UMTA published in the Federal Register a "Policy Statement on Transbus," announcing, inter alia, that effective February 15, 1977, bus manufacturers must offer an optional "wheelchair accessibility package" consisting of a lift or ramp which local transit authorities could choose to order. 13/ The rest of this Policy Statement explained then Administrator Patricelli's decision not to mandate Transbus, an experimental bus featuring a very low floor and a ramp accessible to wheelchair users.

11/ 41 Fed. Reg. 18234 et seq. (April 30, 1976), adding 49 CFR §613.204 and an appendix thereto, an appendix to 23 CFR Part 450, and 49 CFR Part 609.

12/ The preamble to the regulation setting forth criteria for UMTA approvals (49 CFR §613.204) states that "This regulation and advisory information are effective on May 31, 1976." 41 Fed. Reg. 18234 (April 30, 1976). The regulations governing transportation planning, fixed facilities and bus design (49 CFR Part 609) contain a specific section on applicability which states that "This part... applies to projects approved by the Urban Mass Transportation Administrator on or after May 31, 1976 ..." 49 CFR §609.5, 41 Fed. Reg. 18239 (April 30, 1976).

13/ 41 Fed. Reg. 32286 (August 2, 1976). The requirements announced in the August 2, 1976 Policy Statement were added to the regulations by an amendment published in the Federal Register on October 18, 1976. 41 Fed. Reg. 45842 (October 18, 1976). While the Policy Statement also mandated floor and step height requirements for buses, these were subsequently postponed. See 42 Fed. Reg. 9654 (February 16, 1977).

On September 21, 1976, all three major American bus manufacturers submitted bids to the Southern California Rapid Transit District for the production of 200 lift-equipped buses to be purchased with Federal assistance. This was the first time that the manufacturers had submitted bids for lift equipped buses.

On May 4, 1977, pursuant to Executive Order 11914, 14/ the Secretary of Health, Education and Welfare (HEW) published that Department's Final Regulations under section 504 of the Rehabilitation Act, entitled "Nondiscrimination on Basis of Handicap." 15/ These regulations applied only to programs administered by HEW. However, the regulations stated that guidelines for other Government agencies would be promulgated "promptly and independently from this regulation." 16/

On May 19, 1977, Secretary of Transportation Adams, defendant herein, announced a major policy change by mandating "Transbus". 17/ The effect of the announcement was to require that all transit bus procurements issued for bid after September 30, 1979, conform to "Transbus" specifications, e.g., a stationary floor height of not more than 22 inches, lowering to an effective floor height of not more than 18 inches (with the use of a "kneeling feature"), and a ramp for boarding and exiting. The combination of low floor and ramp was determined to be the best means of providing access to standard size buses for wheelchair users as well as ambulatory and semiambulatory passengers.

14/ 41 Fed. Reg. 17871 (April 29, 1976).

15/ 42 Fed. Reg. 22676, et seq. (May 4, 1977).

16/ 42 Fed. Reg. at 22677. Proposed Guidelines have been issued and appear at 42 Fed. Reg. 32264 (June 24, 1977).

17/ The decision document announcing and explaining Secretary Adams' decision is attached to this Brief as Attachment "B".

ARGUMENT

I

UMTA'S PHASED PROGRAM LEADING TO
EFFECTIVE UTILIZATION OF TRANSIT
SYSTEMS BY HANDICAPPED PERSONS IS
AN APPROPRIATE RESPONSE TO 49 U.S.C.
§1612(a) AND 29 U.S.C. §794.

At issue in this case is the propriety of a federal grant of assistance to CDOT for the purchase of two private bus systems and 280 replacement buses. In order to place this grant in its proper context it is necessary to review briefly the plan UMTA has developed to implement section 16(a) of the UMT Act and section 504 of the Rehabilitation Act. Such a review is particularly appropriate in light of the fact that section 16(a) places the primary burden of implementing the announced policy on the federal agency which administers transit programs (UMTA). This review is also appropriate in light of allegations made by plaintiff 18/ that a major part of this plan, UMTA's elderly and handicapped regulations, are legally insufficient.

UMTA interprets the two statutes in issue to require the orderly development of transit services which elderly and handicapped persons can effectively use and which are reasonable by comparison with the services provided to the general public.19/

18/ See Allegations #41 and #42 at P. 15 of Amended Complaint.

19/ Plaintiffs do not dispute this interpretation. They contend at p. 17 of their Brief on Appeal "that 49 U.S.C. § 1612(a) requires defendants to provide mass transportation services to the mobility handicapped that is reasonable by comparison with mass transportation provided the ambulatory public ..."

UMTA is pursuing this mandate by a two-pronged effort. First, UMTA requires applicants for capital or operating assistance to demonstrate a good-faith commitment to planning for the needs of the elderly and handicapped and to implementing those plans. Second, UMTA funds studies, experiments and demonstrations to develop technologies and strategies which local transit bodies will be able to use in meeting the needs of the elderly and handicapped.

These two prongs are the heart of a step-by-step process that will lead to transit systems becoming vastly more accessible to elderly and handicapped persons within a reasonable time. While UMTA will provide financial and technological leadership, the initiative for planning and implementing specific elderly and handicapped services will and should come from local communities. This is in accord with the mandate of the UMT Act, which states at 49 U.S.C. §1601a:

"It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance to exercise the initiative necessary to satisfy its urban mass transportation requirements."

Plaintiffs primarily attack the first prong of UMTA's effort. UMTA has not demanded that every application for a grant of federal assistance contain features specifically aimed at helping elderly

and handicapped persons. 20/ However, UMTA has required applicants to exhibit "special efforts" in planning for the needs of the elderly and handicapped, sufficient to assure UMTA that the relevant transit systems are being modified to become more accessible to the elderly and handicapped. Prior to the advent, on May 31, 1976, of UMTA's elderly and handicapped regulations, "special efforts" was a flexible standard determined on a case by case basis.

A number of courts considered what this "special efforts" standard required. In Snowden v. Birmingham - Jefferson County Transit Authority, 21/ plaintiff sought to enjoin a capital facilities grant for the purchase of buses, a garage, and related facilities, alleging violations of section 16(a) of the UMT Act, section 504 of the Rehabilitation Act, and the Equal Protection Clause of the Federal Constitution. The District Court specifically noted that the buses ordered would have special equipment such as stanchions, grab-rails, step-well lighting, power-assisted doors, etc., to aid ambulatory elderly and handicapped persons. He also took note of the ongoing UMTA research project known as "Transbus", designed to develop a new generation of buses accessible to the non-ambulatory handicapped. Judge Guin concluded that these measures fulfilled the "special efforts" requirement of section 16(a) of the UMT Act. 22/

20/ Section 16(a) of the UMT Act requires that "all Federal programs offering assistance in the field of mass transportation ... should contain provisions implementing this policy," (emphasis supplied), but not that all grants should contain such provisions.

21/ 407 F. Supp. 394 (N.D. Ala., 1975); aff'd per curiam, 551 F. 2d 862 (5th Cir., 1977); rehearing denied May 31, 1977.

22/ 407 F. Supp. at 396-397.

In United Handicapped Federation v. Andre, 23/, the grant of assistance at issue included the purchase of 309 standard-sized buses that were not equipped to transport wheelchair users and ten vans that were so equipped. Judge Alsop found that the ten specially equipped buses and the special features included in the regular buses designed to assist ambulatory elderly and handicapped persons were sufficient "special efforts." 24/ The judge also noted UMTA's research and planning efforts, including the "Transbus" program, in concluding that section 16(a) of the UMT Act had not been violated. 25/

The "special efforts" standard was clarified and made more rigorous by UMTA's elderly and handicapped regulations. 26/

23/ 409 F. Supp. 1297 (D. Minn., 1976); Vacated, No. 76-1396 (8th Cir. June 21, 1977). As will be discussed infra, although the grant of summary judgment in Andre was vacated by the Court of Appeals, the District Court's decision was found to have been justified by the record before that court. (Slip opinion at 7, Attachment "C" to this Brief). It was only the subsequent promulgation of regulations which caused the Court of Appeals to require further proceedings on remand. Hence, discussion of the lower court opinion in Andre is warranted.

24/ 409 F. Supp. at 1300.

25/ I d. at 1299. Both Snowden and Andre noted that wheelchair-accessible buses were not commercially available. Subsequent to those decisions, buses equipped with lifts became available, as was noted by Judge Clarie in the opinion below at footnote 9. This fact does not vitiate the rationale of either Snowden or Andre, since neither of those cases required adoption of all technologically feasible alternatives, but merely "special efforts" to aid the elderly and handicapped.

26/ Supra 41 Fed. Reg. 18234 et seq. (April 30, 1976).

These regulations were authorized by section 16 of the UMT Act, section 165(b) of the Federal-Aid Highway Act of 1973, and section 504 of the Rehabilitation Act of 1973. The purpose of these regulations is to implement the statutes relied upon by plaintiffs in this case. To do so the regulations set forth detailed planning requirements, service requirements and equipment standards designed to make regular transit service more accessible to ambulatory elderly and handicapped persons, and to increase significantly the level of service for wheelchair users and others who cannot negotiate steps.

The first step in the comprehensive program set out by the regulations is a planning process which will lead to coordinated programs for assisting ambulatory and non-ambulatory elderly and handicapped persons. In accordance with 29 CFR Part 450, local transit authorities must submit to UMTA a Transportation Improvement Program "Annual Element" containing projects for which the local transit authority will seek assistance during a given year.^{27/} UMTA's new elderly and handicapped regulations, at 49 CFR § 613.204(b) require that annual elements "submitted after September 30, 1976, contain projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semi-ambulatory capabilities." (emphasis added)

^{27/} A useful description of UMTA's Transportation Improvement Program regulations is found in the case of County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496 (D.D.C., 1976).

Specific examples of the level of effort that must be shown in the annual element to satisfy the "special efforts" standard are illustrated in an Appendix to 49 CFR Part 613 (41 Fed. Reg. 18234). 28/ Finally, to ensure that progress is being made, 49 CFR §613.204(c) conditions project approvals after September 30, 1977, upon a demonstration that reasonable progress has taken place in implementing previously programmed projects.

28/ "UMTA will not specify a program design to meet the "special efforts" requirement. However, the following examples are illustrative of a level of effort that will be deemed to satisfy this requirement with respect to wheelchair users and semiambulatory persons:

1. A program for wheelchair users and semiambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 apportionment to the urbanized area. These "five percent funds" may be derived from sources other than section 5. The term "average" permits lower expenditure years to be balanced by higher expenditure years but does not permit an initial delay in implementing projects. The term "section 5 apportionment" refers to UMTA's formula apportionment for areas with a population of 200,000 or more and to the Governor's apportionment for areas with a population under 200,000. Projects that qualify as local "special efforts" for wheelchair users and other semiambulatory persons under the initial paragraphs of this advisory information would be counted in computing the five percent.
2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or, in the alternative, provision of a substitute service that would provide comparable coverage and service levels.
3. A system, of any design, that would assure that every wheelchair user or semiambulatory person in the urbanized area would have public transportation available if requested for 10 round-trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length, within the service area of the public transportation authority. The system could, for example, provide trip coupons to individuals who would then purchase the needed service.

These examples are illustrative of a level of effort that will satisfy the "special efforts" requirement. They are not regulatory standards or minimums, neither do they exhaust all valid approaches. They are meant to guide the development of local public transportation opportunities for wheelchair users and semiambulatory persons that in fact meet a significant fraction of the identified need within a reasonable time."

This planning program allows maximum local flexibility in deciding what services will best meet the needs of the handicapped, while ensuring that progress is indeed made. By setting out examples of appropriate levels of effort, UMTA leaves it to the local community to decide whether to utilize accessible fixed route service (lift-equipped buses) with or without accessible feeder service, subsidized shared-ride taxi service, dial-a-bus, or some combination of these or other services.

This planning element of the regulations is combined with equipment standards for standard size buses that significantly improve regular service for ambulatory elderly and handicapped persons. 29/ These equipment standards were promulgated in response to the finding that most elderly and handicapped persons have hearing or vision impairments, or suffer from general weakness and physical insecurity .

In addition, UMTA's elderly and handicapped regulations contain a requirement that manufacturers must offer as an option a wheelchair accessibility package which local transit officials may order, consisting of a level-change mechanism (ramp or lift), sufficient doorway and passageway clearances, and at least one securement device. 30/ To date, the only commercially available

29/ 49 CFR §609.15. Among other features, interior handrails and stanchions, non-skid floors, better lighting and destination signs, and priority seating will be required on all new transit buses for which an UMTA grantee issues procurement solicitations after May 31, 1976. This applies, as Judge Clarie noted, to the buses here in issue.

30/ 49 CFR §609.15(b), 41 Fed. Reg. 18240 (April 30, 1976).

wheelchair accessibility device is a mechanical lift. There are several reasons why ordering lift-equipped buses was made optional. Many handicapped individuals regard the lift as degrading and have expressed concern about the difficulty and safety of using it. Additionally, the lifts are cumbersome and time-consuming to operate and will become entirely outmoded by the Transbus ramp. 31/ Hence, the regulations allow local governments to decide whether to offer either lift-equipped buses or special services (vans, taxi-service, etc.) to provide for the needs of elderly and handicapped persons.

UMTA's elderly and handicapped regulations thus provide direction for reaching UMTA's goal of increased accessibility, while at the same time setting a legal standard for what are sufficient "special efforts" on the part of a grantee seeking project approval after May 31, 1976. Cases which have considered the regulations have all implicitly assumed that the regulations set the standard for post-May 31, 1976 grants. The United States Court of Appeals for the Seventh Circuit in Lloyd v. The Illinois Regional Transportation Authority, 32/ analyzed UMTA's regulations, and stated that "they do suggest a commitment to an affirmative remedial program of substantial scope." 33/ Since the district court had not analyzed the level of special efforts made by defendants, the Circuit Court remanded to determine whether

31/ See Decision of Brock Adams, Secretary of Transportation, to Mandate Transbus, pp. 6, 11; Attachment "B" to this Brief.

32/ 548 F.2d 1277 (7th Cir., 1977).

33/ 548 F.2d at 1283.

defendants were in compliance with the regulations. 34/ The plaintiffs in Lloyd did not challenge any particular grant. However, the Court of Appeals noted that since the UMTA regulations became effective May 31, 1976, the District Court should, on remand, consider "post-May 31 allegations." 35/ Similarly, the district court judge in Vanko v. Finney 36/ in considering a July 28, 1976, application for financial assistance, requested supplemental briefs on the issue of whether the local transit system measured up to the standards of the regulations. 37/

The second prong of UMTA's effort to move toward integration of elderly and handicapped persons into the nation's transit systems involves research, development, and demonstration programs. An example of this type of effort is the Westport, Connecticut taxi demonstration project discussed by Judge Clarie at footnote 10 in the opinion below. This project seeks to integrate traditional transit services operated by a public agency with services operated

34/ 548 F.2d 1277 (7th Cir., 1977).

35/ 548 F.2d at 1287, n. 30.

36/ Civil No. 76-1305 (N.D. Ohio, June 1, 1977). Slip opinion attached to this Brief as Attachment "D".

37/ Id. at p. 11 generally and at footnote 7. The United States Court of Appeals for the Eighth Circuit in United Handicapped Federation v. Andre, supra, (Attachment "C" to this Brief), also implicitly accepted the validity of the regulations as a measuring standard. Slip opinion at pp. 5-7.

by a private operator under contract to the public agency, and is designed to serve as a model for potential statewide or nationwide application.

A very significant UMTA effort in this area is the development of Transbus. After a sustained period of design and testing in several cities of Transbus prototypes, Secretary of Transportation Adams on May 19, 1977, announced that all transit bus procurements issued for bid after September 30, 1979, will be required to conform to Transbus specifications. These specifications include an effective floor height of not more than 18 inches, after use of a "kneeling feature", and a ramp for boarding and exiting. The combination of low floor and ramp was determined to be the best means of providing access to standard-size buses for wheelchair users as well as ambulatory and semiambulatory passengers. 38/

Significantly, the Secretary announced that during the period before "Transbus" is introduced, the existing elderly and handicapped regulations should remain in effect. Thus, during the interim period before Transbus, all manufacturers will be required to offer optional equipment (e.g. lifts) for accomodating wheelchair users, and all local transit authorities must either purchase accessible equipment or provide special services in accordance with the terms of the regulations. 39/

38/ See, generally, Attachment "B".

39/ Attachment "B", at pp. 10-11. See also Andre, supra, Slip opinion (Attachment "C") at p. 8, n. 11.

In summary, UMTA's efforts to implement section 16(a) of the UMT Act and section 504 of the Rehabilitation Act represent a dynamic process of imposing steadily stricter requirements on local communities to plan and implement transit services accommodating elderly and handicapped persons. 40/ These efforts represent a carefully drawn balance between the need for federal enforcement of these beneficial statutes and the need to allow local communities to be the primary planners and initiators of mass transit services. These efforts also recognize that there is a need to maintain and continue existing transit service for the general public during the timeperiod when special attention is directed to the provision of service to those elderly and handicapped formerly unable to utilize mass transit. It is in this context that the grant challenged here should be examined.

40/ Supporting this approach the district court in Vanko v. Finley, supra, declared:

"Congress' mandate that mass transit systems undertake "special efforts" for the elderly and handicapped is therefore a dynamic, rather than a static, requirement, the specific contours of which can only be defined by the state of mass transportation technology at any particular moment."

Slip opinion (Attachment "D") at p. 8, footnote 3.

II

UMTA'S APPROVAL OF THE GRANT IN THIS CASE
WAS IN ACCORDANCE WITH STATUTORY STANDARDS.1. Judge Clarie Was Correct In Finding Sufficient "Special Efforts" On The Part Of Defendants.

UMTA approved the complained-of grant on May 12, 1976, prior to the May 31 effective date of UMTA's elderly and handicapped regulations. Hence the appropriate standard to judge the grant approval is the flexible "special efforts" standard enunciated by Snowden and similar cases, rather than the more rigid standards set forth in the Appendix to 49 CFR Part 613. 41/ This approach was correctly followed by Judge Clarie, who found that " ... a good faith effort is presently being made to promote the interests of the elderly and handicapped in the development of Connecticut's urban mass transit systems." (emphasis in original). 42/

A unique and important aspect of the grant approval in this case is the special condition that was attached to it. This condition required that CDOT amend the Transit Development Plans for the Hartford, New Haven and Stamford areas to include efforts "to provide to elderly and physically handicapped persons mass transportation service which they can effectively use, pursuant to UMTA Regulations appearing in 41 F.R. 18234 et. seq..." The condition also required, within 12 months, the submission of one

41/ Relevant parts of this appendix are set forth at Footnote 28, supra.

42/ Slip opinion at p. 8.

or more applications for capital assistance to implement such amendments. 43/

This condition effectively assures that CDOT will extend existing special services for elderly and handicapped persons since a failure to do so would risk the loss of federal financial assistance for the pending purchase of 280 buses. 44/

43/ UMTA Capital Grant Contract, Part I, p. 1a; attached to Patricelli Affidavit.

44/ Plaintiff's Brief alleges generally that UMTA has not taken action to enforce the special condition (Brief at p. 13) and specifically that a ten van system proposed by CDOT before trial has not been included in subsequent Transportation Improvement Plans and has not been the subject of an application for federal funds (Brief at p. 5, footnote 2). These allegations concern matters which occurred after the District Court granted the motion for summary judgment and hence are not properly considered on appeal. However, since plaintiff has raised the issue, federal defendants feel obliged to point out that the condition remains firm in its intention to enforce the special condition. As evidence of this intention, federal defendants invite the court's attention to a letter from Jerome C. Premo, former Associate Administrator for Transit Assistance of UMTA, to James Shugrue, Commissioner of CDOT, attached to this Brief as Attachment "E". As the letter demonstrates, CDOT will have to begin implementation of expanded special services for elderly and handicapped persons before it can receive federal money for the 280 replacement buses.

At least one court has held that when a transit district contracts to do something as part of a grant project (in that case install bus shelters), the Department of Transportation has authority under the UMT Act to either withhold further financial assistance, or bring suit for damages or specific performance to enforce the grant contract. McDonald v. Stockton Metropolitan Transit District, 36 Cal. App. 436, 111 Cal. Rptr. 637 (1974).

This condition also has the effect of applying the guidelines contained in UMTA's elderly and handicapped regulations 45/ to CDOT planning and implementation efforts which were to take place after the May 12, 1976, grant approval. As a result of the condition CDOT was required to begin implementation of previously programmed projects for the elderly and handicapped within one year of May 12, 1976, significantly sooner than other grantees, who had until September 30, 1977, to demonstrate reasonable progress in implementation. The condition thus served to accelerate CDOT duties to plan for and implement projects other than the grant in issue here. As to the grant challenged here, the regulations had no effect whatsoever on the question of whether or not UMTA was entitled to give its approval, since the regulations were not in effect at that time.

While this type of special condition has not previously been considered by courts, the contractual approach it represents is an appropriate means to implement the relevant statutes. Especially where, as here, the grantee contracts to make greater efforts than would normally be required of similarly situated grantees, the contractual provision should be considered as a significant "special effort".

Even apart from the special condition, CDOT's efforts to plan and provide services for elderly and handicapped persons justified UMTA's decision to approve the grant. As indicated in the approval memorandum which accompanied the grant contact, 46/

45/ See footnote 28, supra.

46/ Attachment "A" at p. 5.

the Hartford Transportation Development Plan identified two alternative projects for serving the elderly and handicapped, while studies were under way in New Haven and Stamford regarding setting up a structure to coordinate elderly and handicapped services. In addition, CDOT had provided money for 24 vehicles (17 of which were lift-equipped) which would be used by private non-profit agencies throughout the state, and was planning to provide funds for more such vehicles. ^{47/} While concern for the elderly and handicapped in Connecticut gave UMTA reason to insist, by way of a special condition, on greater efforts by CDOT in the future, it did not justify refusing approval of this worthwhile project. This is especially so in light of the fact that the project as approved stood to benefit many ambulatory elderly and handicapped by upgrading the relevant transit systems and by making the replacement buses more accessible through special lighting, stanchions, grab rails and similar features.

2. The Approval Of A Grant For Buses Which Did Not Include Wheelchair Lifts Did Not Unlawfully Discriminate Against Non-Ambulatory Handicapped Persons.

Judge Clarie correctly noted ^{48/} that the buses ordered by CDOT must be equipped with certain features to assist the ambulatory elderly and handicapped. However, the buses will not be

^{47/} There is no substance to plaintiffs' allegation that elderly and handicapped services funded out of § 16(b)(2) of the UMT Act cannot be considered as "special efforts". "Special efforts" are defined broadly in §16(a) to include "mass transportation which they (elderly and handicapped persons) can effectively utilize" While §16(b)(2) programs are not the complete answer for providing effective access for elderly and handicapped, they provide an important interim means of getting a good number of these persons where they need to go, e.g., therapy centers and job sites.

^{48/} Slip opinion at p. 4.

equipped with wheelchair lifts. Feasible wheelchair lift devices were not available when this grant was approved by UMTA on May 12, 1976. 49/ Subsequent to the approval but prior to the decision, such lifts became commercially available. 50/ It can hardly be said that UMTA erred in approving a grant without lifts when such lifts were not then commercially available. Furthermore, even though the lifts subsequently became available, Judge Clarie was entirely correct in concluding, at footnote 9, that Connecticut could pursue alternative paths to accessibility which did not involve the problems created by lifts. 51/ We note that his approach is entirely consistent with the policies expressed in UMTA's elderly and handicapped regulations and in the recent decision of the Department of Transportation to mandate Transbus.

The thrust of planitiff's argument in this regard appears to be that the funding of a bus system lacking wheelchair access devices discriminates against handicapped persons who are confined to wheelchairs, in contravention of §504 of the Rehabilitation Act. 52/

49/ Patricelli Affidavit, para. 8, 10.

50/ Slip opinion below at footnote 9.

51/ See discussion of lifts in text at footnote 31, supra.

52/ It is not entirely clear what Plaintiffs' believe that §504 of the Rehabilitation Act requires. While at one point Plaintiffs contend that this provision forbids federal assistance for the purchase of inaccessible buses (Brief on Appeal at p. 45) at another point they seem to contend that §504 only requires the development of concrete plans to provide mass transportation to the handicapped (Brief at p. 49).

It is clear that §504 of the Rehabilitation Act of 1973 does not mandate equal access to all transit vehicles by all handicapped persons. This is apparent from a reading of 29 U.S.C. §792(c)(1)(A), which is also a part of the 1973 Rehabilitation Act:

"The (Transportation Barriers Compliance Board) shall also...determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems..."(Emphasis added).

The District Court Judge in Vanko v. Finley: 53/

"...agree (d) with the defendants that this provision (29 U.S.C. §792(c)(1)(A)) is evidence that Congress did not intend the Rehabilitation Act to require that all handicapped individuals be fully integrated into main-stream mass transportation systems."

The true purpose of section 504 was expressed by the Senate Committee on Labor and Public Welfare, to which the Rehabilitation Act of 1973 was referred:

"The bill further includes a provision proclaiming a policy of non-discrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance."
(Emphasis added) 54/

This broad policy is being implemented by UMTA through the administrative policies, regulations and research efforts

53/ Supra, Attachment "D" to this Brief, p. 13 n. 11.

54/ Sen. Rep. No. 318, 93rd Cong. 1st. Sess. (July 16, 1973).

described in Part I of this brief. This broad-based program is in accord with Section 1 of the Rehabilitation Act, which provides:

"The purpose of this chapter is to provide a statutory basis for the Rehabilitation Services Administration, and to authorize programs to...

* * *

(11) evaluate existing approaches to architectural and transportation barriers, confronting handicapped individuals, develop new such approaches, enforce statutory and regulatory standards and requirements regarding barrier free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals." (Emphasis added) (29 U.S.C. §701)

Thus, a reading of the entire Act shows that Congress was fully aware of the magnitude and complexity of the problem being addressed. While Congress clearly intended that positive steps be taken toward reducing the barriers which prevent handicapped persons from using transportation facilities, Congress did not intend to prohibit the use of Federal funds in every project which includes transit equipment that is inaccessible to a certain class of handicapped persons.

Judge Clarie's holding with respect to §504 of the Rehabilitation Act was that the statute did not "require greater affirmative action on the part of the government, than it is presently undertaking." 55/ Though the Judge mentioned in passing that some courts have held §504 is violated only when there is an affirmative exclusion, he did not rest his holding on that principle, but instead rested it upon the "good-faith" efforts of federal and state defendants to promote the interests of the elderly and

55/ Slip opinion at p. 10.

handicapped. 56/

Judge Clarie's approach was proper. While UMTA's elderly and handicapped regulations, which implemented section 504, require specified levels of planning to take place in the year following September 30, 1976, and certain implementation efforts to take place before September 30, 1977, these planning and implementation standards have no effect on this project. Hence the more general "special efforts" standard is the appropriate measure for deciding whether this project complied with §504. 57/ As described supra at pp. 21-24 "special efforts" were indeed present in this case.

Cases relied upon by plaintiffs are all distinguishable. The United States Court of Appeals for the Seventh Circuit in Lloyd v. The Regional Transportation Authority, supra, considered only the question of whether section 504 of the Rehabilitation Act creates rights which can be enforced by a private cause of action. This narrow focus came about because the District Court

56/ Plaintiff's arguments regarding "discriminatory intent" (Plaintiffs' Brief at pp. 32-33, 45-49) appear to stem from their belief that Judge Clarie held that §504 only prohibited affirmative exclusion. It is clear, however, that the judge believed that §504 did require "affirmative action," hence many of plaintiffs' arguments in this area are simply irrelevant.

57/ Judge Clarie overlooked the fact that UMTA's elderly and handicapped regulations were promulgated, in part, under the authority of §504 of the Rehabilitation Act. This oversight in no way affects the correctness of his decision, since the proper standard for measuring the grant approval was the preregulation "special efforts" standard, which Judge Clarie applied.

had dismissed the case without reaching the question of whether appropriate affirmative steps had been taken to meet the needs of elderly and handicapped persons. Subsequent to the District Court dismissal, UMTA promulgated its elderly and handicapped regulations. The Court of Appeals held that "section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed." (Emphasis supplied) 58/ The Court of Appeals remanded the case to the District Court to determine whether defendants were in compliance with the regulations. 59/

Lloyd is distinguishable for a number of reasons. First, the plaintiffs in Lloyd did not challenge a specific project as did plaintiffs herein. Second, the District Court did not reach the "special efforts" question, as it did here, which made a remand necessary. Third, the District Court in Lloyd did not have the benefit of UMTA's regulations at the time that case was decided. Here Judge Clarie was able to consider the regulations though a large portion of them did not apply to the pre-May 31 grant approval. 60/

58/ 548 F.2d at 1281.

59/ 548 F.2d at 1287.

60/ The Court of Appeals in Lloyd noted that the District Court should not be faulted for its decision to dismiss. "Without the benefit of any regulations, it is difficult to perceive what relief could have been allowed at that stage." Id. See also, United Handicapped Federation v. Andre, supra, Slip opinion at 7, where the Eighth Circuit Court of Appeals stated: "On the basis of the record before the district court if it were not for the subsequent promulgation of the administrative guidelines and regulations, we would agree with the district court's result."

Bartels v. Biernat, 247 F. Supp. 226 (E. D. Wis. 1977) is the only case filed by elderly and handicapped plaintiffs against transit authorities where a judge has found insufficient efforts to meet the statutory standards. 61/ The holding against federal defendants in Bartels was as follows:

"Defendants Coleman and Patricelli, by approving the Application of MCTB for capital assistance with full knowledge that both the existing transit system and the one hundred new buses would be effectively inaccessible to handicapped individuals and by correspondingly failing to require Milwaukee County to give assurances that appropriate mass transit services would be provided to the mobility handicapped so as not to exclude such individuals from the federally assisted mass transit program, have discriminated against plaintiffs in violation of the rights declared in 29 U.S.C. §794."
(Emphasis supplied) 62/

The failure of federal defendants to require proper assurances from Milwaukee County was crucial to the judge's holding. This factor distinguishes Bartels from the case herein, where a contractual assurance to plan and implement significant services for elderly and handicapped persons was obtained from CDOT. 63/

61/ Cases where special efforts have been found sufficient are Snowden v. Birmingham - Jefferson County Transit Authority, supra; Webb et. al. v. Miami Valley Regional Transit Authority et. al., Civil Action No. C-3-75-67 (S.D., Ohio, January 19, 1976); United Handicapped Federation v. Andre, 409 F. Supp. 1297 (D. Minn. 1975), reversed on other grounds, No. 76-1396 (8th Cir., 1977); and Leary v. Crapsey, Civil No. 76-286 (W.D. N.Y., Mar. 31, 1977).

62/ 247 F. Supp. at 231.

63/ See discussion, supra, at footnotes 43 and 44.

It is difficult to see what relevance Lau v. Nichols 64/ has to this case, or to the area of transportation funding in general. To the extent that it is offered for the proposition that section 504 of the Rehabilitation Act of 1973 creates a private cause of action, defendants have no quarrel with it.

64/ 414 U.S. 563 (1974). Lau considered section 601 of the Civil Rights Act of 1964.

III

THE DISTRICT COURT WAS CORRECT IN FINDING
THAT DEFENDANTS HAD NOT VIOLATED PLAINTIFF'S
RIGHTS TO EQUAL PROTECTION OF THE LAWS UNDER
THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED
STATES CONSTITUTION

At the outset, it should be noted that the acts alleged to constitute discrimination involve judgments as to the best means to assure the greatest degree of accessibility to mass transportation services by elderly and handicapped persons. There is no evidence of an active policy by any of the defendants of barring plaintiffs or anyone else from federally assisted transit buses. In fact, the "special efforts" made by defendants, and recognized by the trial court, represent a policy of making mass transportation more available to all physically handicapped persons. The federal defendants contend that there has been no discrimination against handicapped persons.

Assuming, arguendo, that defendants' acts or alleged omissions did "discriminate" against plaintiffs, plaintiffs still fail to show any Constitutional violation. Unless it can be demonstrated that plaintiffs have been subject to an invidious discrimination in the exercise of a fundamental right, or a discrimination resulting from a suspect classification, the Constitution simply requires a rational basis for any discrimination that does exist. The Supreme Court made this clear in Dandridge v. Williams, 65/ when it held as follows:

65/ 397 U.S. 471, 485 (1970).

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78. The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific'. Metropolitan Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 336 U.S. 420, 426."

Judge Clarie properly found that handicapped persons are not members of a "suspect class." This conclusion is well supported by the cases, 66/ and indeed is not directly attacked by plaintiffs on appeal.

Plaintiffs do assert that they are being deprived of certain fundamental rights. While correctly admitting that the right to intrastate travel has not been held to be fundamental, 67/ plaintiffs argue that their inability to use existing mass transportation facilities "heavily intrude(s) on the exercise of other firmly established fundamental rights, including the right to vote." 68/ While agreeing that the right to vote is fundamental, we submit that plaintiffs' rights in this area have not been violated. In San Antonio School District v. Rodriguez, 69/

66/ See Frontiero v. Richardson 411 U.S. 677, 682 (1972); and Gurmankin v. Costanzo, 411 F. Supp. 982, 992 (E.D.Penn. 1976).

67/ See, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 254-255 (1974).

68/ Plaintiffs Brief on Appeal at p. 77.

69/ 411 U.S. 1, 36 (1973).

the Supreme Court, agreeing that educational expenditures have a nexus with the relative abilities of people to exercise the rights of speech and the franchise, nevertheless rejected a claim that this nexus proved a violation of those rights:

"We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities." (Emphasis added).

Thus, we submit that achieving the laudable goal of assuring the most effective participation in democratic processes is not constitutionally required.

Plaintiffs urge this Court to disregard the two-tiered equal protection analysis which demands that some classifications be justified by a "compelling state interest" and some merely by a showing that they bear a rational relationship to a legitimate state purpose. Plaintiffs err in asserting that the Supreme Court has abandoned this system of classification. In fact, in San Antonio School District v. Rodriguez, the Supreme Court majority refused to alter the traditional test, decree any new suspect classes or create new fundamental rights. Plaintiffs' reliance on Craig v. Boren 70/ is misplaced. The holding of that case is

7 U.S. 190, (1976).

narrowly limited to the field of discrimination on the basis of gender. To gender-based discrimination, the Supreme Court has on occasion applied a "stepped up" rational basis test which inquires whether the classification by sex serves important governmental objectives and is substantially related to achievement of those objectives. 71/ However, the Supreme Court has not modified the traditional two-tiered approach in other areas. 72/

Federal defendant submits that the Supreme Court in the San Antonio School District case, supra, set forth appropriate guidelines for consideration of cases such as that at bar. There the Court found that the financing of local education presents a "myriad of intractable economic, social and even philosophical problems." 73/ Hence,

"In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." 74/

So, too, in the instant case, there is the need for flexibility in determining the most effective means of providing transportation services for the handicapped. The comprehensive program arrived at

71/ See Reed v. Reed, 404 U.S. 71 (1971).

72/ Craig v. Boren, supra, Concurring Opinion of Justice Powell at p. 210-211 n.* See also Crawford v. Cushman, 531 F.2d 114, 1121-1122 (2nd Cir., 1976).

73/ 411 U.S. at 42.

74/ 411 U.S. at 43.

by federal defendant, and described at Part I of this Argument, is indeed rationally related to the legitimate goal of providing transportation services to everyone, as required by the statutes discussed previously. The means adopted to accommodate the elderly and handicapped thus do not deny equal protection.

IV

JUDICIAL REVIEW OF UMTA'S INTERPRETATION
OF THE STATUTES RELIED UPON BY PLAINTIFFS
IS STRICTLY LIMITED

This case falls within the familiar category of challenges to administrative action brought by parties seeking to press their particular solutions to the resolution of complex public issues. The issues herein concern the most effective means for implementing the will of Congress expressed in section 16(a) of the UMT Act and section 504 of the Rehabilitation Act. As the implementation of these statutes involves difficult policy choices and complex technical judgments, courts should be very reluctant to second-guess the decisions of the agencies given implementation responsibility by Congress.

The importance of judicial deference to the expertise of administrative agencies in this area has often been noted by the courts. Judge Huxett, in Pullman v. Volpe, 75/, a controversy involving an UMTA grant, stated the case against substitution of judicial judgment for that of the agency vested with the decisional responsibility:

The issues which plaintiff urges upon the court are the type that require expertise in the area of transit planning and construction. Congress, in UMTA, provided for grant-in-aid channeled through an agency with expertise in transportation matters, to local authorities which were charged with the formulation and execution of the transportation plan. This statutory scheme, therefore, involved two bodies which were equipped to make decisions of the type challenged in this case. A court does not have the expertise to make a knowledgeable decision in such matters. 76/

75/ 337 F. Supp. 432 (E.D. Pa., 1971).

76/ 337 F. Supp. at 439.

The case against substitution of judicial judgment is particularly strong where the issues involve the proper remedy to reach broadly worded policies such as those stated in the two statutes relied upon by plaintiffs. In upholding an interpretation of the National Labor Relations Act by the National Labor Relations Board, the Supreme Court stated in Phelps Dodge Corp. v. N.L.R.B.: 77/

"Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." 78/

The Supreme Court has also said:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." 79/

Judge Clarie was thus correct in simply inquiring whether good-faith efforts to help the elderly and handicapped were being made, and not engaging in a minute investigation of what particular measures should or should not have been instituted.

In the terms of the Administrative Procedure Act, a court's review of a grant such as the one here at issue is limited to determining whether the agency acted within the scope of its authority and whether the decision made was arbitrary, capricious,

77/ 313 U.S. 177 (1940).

78/ 313 U.S. at 194.

79/ Udall v. Tallman, 380 U.S. 1, 16 (1964).

an abuse of discretion or otherwise not in accordance with law. 80/ It appears that Judge Clarie applied this standard, since in his discussion at page 8 of the slip opinion he required plaintiffs to show a "clear abuse of discretion." Under this standard of review the court should engage in a substantial inquiry into the facts to consider whether the challenged actions were based on consideration of the relevant factors and whether there was a clear error; however, the court may not substitute its judgment for that of the agency. 81/ Judge Clarie made such a substantial inquiry, as evidenced by the more than 400 pages of hearing transcript, and considered all possible relevant factors. This Court, without the same ability to see and hear witnesses, should hesitate before disagreeing with Judge Clarie's opinion that no clear error had been made.

80/ 5 U.S.C. §706(2)(A), (B), (C), and (D). As the instant case involves neither agency action taken pursuant to rulemaking authority nor action based upon an adjudicatory hearing, the "substantial evidence" standard of §706(2)(E) was not applicable. A trial de novo under §706(2)(F) was clearly not appropriate since the action here was not adjudicatory in nature and the plaintiffs did not seek to enforce the agency's action. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

81/ Citizens to Preserve Overton Park v. Volpe, at 416.

V

SUMMARY JUDGMENT FOR DEFENDANTS
WAS APPROPRIATE IN THIS CASE

Plaintiffs argue that it was error for the trial court to grant defendants' motion for summary judgment on the basis of the affidavits, documents, and hearing testimony comprising the record in this case. 82/ Federal Defendants submit that the record in this case is complete, that there are no material facts in dispute, and that the only issues before the trial court were issues of law, which were properly disposed of by summary judgment, as provided in Rule 56 of the Federal Rules of Civil Procedure.

At issue in this case is the scope of the legal obligation of the federal defendants and CDOT, arising out of UMTA's grant approval of May 12, 1977, to provide transportation services in the three city area. Plaintiffs claim that federal defendants, by funding a transportation system that was inaccessible to some handicapped persons, did not meet their obligation under relevant statutes and the equal protection clause of the Constitution. Federal defendants submit that their legal obligation is not so broad, and that UMTA's step-by-step plan leading to eventual accessibility for handicapped persons is legally sufficient. Federal defendants also submit that approval of the specific grant complained of was consistent with this step-by-step plan, and with applicable statutes. The scope of defendants' obligation to the handicapped is a strictly legal question, appropriate for summary judgment.

82/ It is clear that Judge Clarie relied on matters outside the pleadings in ruling on this case. Thus, there is no question that he treated the motion as one for summary judgment.

Plaintiffs assert that there was a disputed issue as to the cost and efficiency of lift-equipped buses. ^{83/} As discussed supra, the policy of UMTA has been to leave to the local community the choice of instituting either lift-equipped regular route service or adequate special services. The regulations follow this policy by making wheelchair-accessibility packages an option for local communities. ^{84/} While it is possible to raise a legal question whether this policy fulfills the intent of the statute, the factual questions of whether lifts cost \$2000 or \$5000 and whether they operate efficiently or not are utterly irrelevant to the decision of this case.

Similarly, the motive or intent of government officials in pursuing particular policies or in approving this grant are immaterial. To interpret section 504 of the Rehabilitation Act of 1973 to require a determination of the mental processes of government officials whenever a charge of discrimination is made would simply clog the courts and impede the administration of government.

The question of whether sufficient "special efforts" were being made to fulfill the requirement of section 16(a) of the UMT Act is also a legal question appropriate for summary judgment.

^{83/} After September 21, 1976, the date after which lift-equipped buses became commercially available, the question regarding the availability of such buses was completely resolved.

^{84/} 49 CFR 609.15(b). As discussed above communities must purchase the wheelchair-accessible Transbus after September 30, 1979, however.

In fact, no court which has considered alleged violations of section 16(a) has refused to proceed by summary judgment. ^{85/} Even Bartels v. Biernat, supra, heavily relied upon by plaintiffs, was decided on a motion for summary judgment by plaintiff therein.

Plaintiffs argue that the actions evidencing CDOT's special efforts in this case presented disputed factual issues. Plaintiffs do not deny the existence of the van program instituted by Connecticut under section 16(b)(2) of the UMT Act, but charge that it should not have been counted as a "special effort" under section 16(a) of the Act. ^{86/} This is a legal, not a factual issue. Plaintiffs also assert that some of CDOT's elderly and handicapped planning efforts were "speculative". Defendants submit that all planning is to some degree speculative and the fact that this is so does not render admitted planning efforts disputed issues of fact. The law requires "special efforts" in planning for elderly and handicapped persons, not that each and every plan suggested be implemented. Whether an appropriate level of "special efforts" is present is, again, a legal question.

Thus the trial court was entirely correct in granting Defendants' Motion for Summary Judgment based upon the uncontroverted material facts in the record.

^{85/} See Snowden v. Birmingham - Jefferson County Transit Authority, supra, Webb v. Miami Valley Regional Transit Authority, supra, United Handicapped Federation v. Andre, supra, Leary v. Crapsey, supra, Bartels v. Biernat, supra.

^{86/} Plaintiff's Brief at pp. 26-28.

VI

REMAND OF THIS CASE FOR FURTHER CONSIDERATION
IN LIGHT OF RECENT ADMINISTRATIVE DEVELOPMENTS
IS UNNECESSARY AND LEGALLY UNSOUND

On June 21, 1977, after submission of Plaintiffs' Brief on Appeal, the United States Court of Appeals for the Eighth Circuit ruled on the Andre case, discussed supra at page 13. 87/ In Andre, the District Court granted summary judgment for defendants, on grounds that special efforts to aid the elderly and handicapped were being made. 88/ The District Court decision (filed March 11, 1976) predated promulgation of UMTA's elderly and handicapped regulations. The Court of Appeals vacated the grant of summary judgment and remanded the case. The Court stated as its rationale:

On the basis of the record before the district court, if it were not for the subsequent promulgation of the administrative guidelines and regulations, we would agree with the district court's results. However, we feel that the denial of relief to the plaintiffs cannot be justified in light of these recent definitions and guidelines. Although the buses in question here have been purchased and placed in service, because of the recent developments the defendants now have the burden to take affirmative action to conform to the regulations and guidelines. It is difficult to assess the record and the statutes in any other light.

Under the circumstances we vacate the grant of summary judgment and remand to the district court for further proceedings. The district court, upon receiving further evidence, should reappraise defendants' compliance with the statutes, regulations and guidelines, and fashion whatever equitable relief it deems necessary. 89/

87/ The memorandum of opinion of the Court of Appeals is attached to this Brief as Attachment "C".

88/ 409 F. Supp. at 1300.

89/ Slip opinion at pp. 7-8.

Of course, federal defendants have no quarrel with the Court of Appeal's finding that the District Court's result was correct. However, we question whether a remand in light of the subsequently promulgated regulations was proper. The regulations, by mandating an explicit effective date, show a clear intention to apply only prospectively, i.e. to grants approved after May 31, 1976. They, therefore, had no application to the grant challenged in Andre, which was approved on June 12, 1974. 90/ The Eighth Circuit Court seemed to recognize this when it said:

"Although the buses here have been purchased and placed in service, because of the recent developments the defendants now have the burden to take affirmative action to conform to the regulations and guidelines." (Emphasis supplied).

The court thus appears to have held that although the project complained of was proper, the District Court must nevertheless monitor whether newly planned projects are meeting the regulatory guidelines. 91/

Federal defendants strongly disagree with the approach taken in Andre. An appeals court should not give its stamp of approval to a contested grant and then remand to keep a continuing check on whether agency officials are complying with the statutes. To do so

90/ 409 F. Supp. 1299.

91/ This result differs significantly from the result in Lloyd v. Illinois Regional Transportation Authority, supra. In Lloyd, plaintiffs did not challenge a particular grant, and in addition, the District Court erroneously refused to consider the merits of their cause of action. Hence, a remand to consider "post May 31, 1976 allegations" was conceivably the fairest way to dispose of the case.

oversteps the boundary separating the proper roles of administrative agencies and reviewing courts. An agency like UMTA must be given the latitude to at least attempt initial interpretation and enforcement of its regulations, especially when those regulations are new. 92/ The agency must also be given the benefit of a presumption that it will enforce the regulations consistently with the statute. If the agency fails to correctly interpret or enforce its regulations, an aggrieved party may then seek the intervention of a court of law. The Andre decision short-circuits this long-established and proper sequence by asking the trial court on remand to interpret the regulations in an abstract setting before UMTA has had a chance to work out a practical compliance schedule with the local transit authority.

The rationale behind the general judicial reluctance to intercede while an agency is in the process of formulating and implementing new policies takes expression in the ripeness doctrine. The Supreme Court has stated the rationale as follows:

92/ Similarly, in the case at bar, UMTA must be given the opportunity to enforce its own grant contract, which requires Connecticut to maintain a high level of elderly and handicapped planning and implementation, before a court steps in to judicially enforce compliance with the statutes.

"Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 93/

An instructive recent case considering the ripeness doctrine as it applies to a contested federal grant in Knoxville Progressive Christian Coalition v. Testerman. 94/ In that case plaintiffs sought to enjoin the Secretary of Housing and Urban Development from releasing funds to a city which had received a conditional grant approval but which was allegedly planning to use funds for ineligible projects. The district court noted that:

"The provisions of the Community Development Act reveal that it contemplates a continuing dialogue between local officials and the Secretary during the implementation of a locality's community development program... Furthermore, the Act provides that the Secretary may reduce, terminate or even recover funds which are expended on ineligible projects.

Presumably the Secretary will carry out her responsibilities under the Act to oversee the use of funds in question and will insure that they are spent only on eligible projects." 95/

The judge concluded that "Judicial intervention at this time would only serve to interrupt efficient operation of the Act," and dismissed the case as being not ripe for review. 96/

93/ Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967).

94/ 404 F. Supp. 783 (E.D. Tenn., 1975).

95/ 404 F. Supp. at 789-790.

96/ 404 F. Supp. at 790.

Similarly in the case at bar, the implementation of efforts to aid the elderly and handicapped of Connecticut will take place in the context of a continuing dialogue between local officials and the Administrator of UMTA, and will be influenced by UMTA's ability to cut off funds if sufficient local efforts are not forthcoming. Judicial intervention in the form of a remand for consideration of this ongoing process would thus be inappropriate in this case also.

The Andre decision not only represents an unwarranted intrusion into the proper functioning of an agency, it also threatens to produce lawsuits which never terminate. As described in Section I of this brief, UMTA has devised a dynamic, step-by-step process for reaching the statutorily mandated goals. New and stricter requirements are placed upon grantees as the process evolves. If Andre is correct, a district court could decide that a defendant has complied with one phase of the process only to have the court of appeals remand to consider whether defendant is in compliance with a new and stricter phase, and so on ad infinitum. The same result could happen here if a remand is ordered.

The federal defendants therefore submit that this court should not follow the Andre decision by ordering a remand. A remand would in fact be even more inappropriate in this case than in Andre. In this case, Judge Clarie had the newly

promulgated regulations in front of him, and in fact specifically mentioned the regulations, at footnote 9. Unlike the District Court in Andre, Judge Clarie was able to consider the regulations for whatever light they may shed on this pre-regulation grant. A remand for consideration of the regulations is thus not only inappropriate, but also unnecessary, since such a consideration has already been made. 97/

97/ If this Court desires, nevertheless, to remand the case, the Court should at least explicitly state which issues and agency actions the District Court should consider. The Eighth Circuit's instruction in Andre to "reappraise defendants' compliance with the statutes, regulations and guidelines," is so broad that it seemingly allows the District Court to reconsider the original pre-regulation UMTA grant, and other agency actions inappropriate for judicial review.

CONCLUSION

UMTA's step-by-step program for bringing about effective access to mass transportation for handicapped persons will ultimately give plaintiffs all the relief they desire. In Plaintiff's Brief on Appeal at page 60 it is stated:

"Plaintiffs do ask that defendants be charged with the responsibility for devising a plan, whether it involves the use of standard size buses and/or small mini-buses run in a dial-a-ride mode, that will result in the public transportation system being made effectively accessible to the mobility handicapped."

By imposing and by enforcing the special condition placed on CDOT by the grant contract, 98/ UMTA has assured that significant planning and implementation of systems serving the handicapped will take place. Further, UMTA's elderly and handicapped regulations assure that Connecticut must take steps to establish transportation service for wheelchair users and semiambulatory handicapped persons that is "reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period." 99/

Finally, UMTA's Transbus program assures that all federally assisted regular-route buses ordered after September 30, 1979, will be fully accessible to wheelchair users. In light of these

98/ Discussed supra at ftms 43 and 44.

99/ 41 Fed. Reg. 18236, (April 30, 1976).

strong efforts, plaintiffs cannot complain that the mandate of the statutes and the constitution has not been fulfilled.

The ruling of the District Court in granting defendants' motion for summary judgment was correct and should be affirmed.

Respectfully submitted,

Of Counsel:

Peter C. Dorsey
United States Attorney

Robert W. Batchelder
Acting Assistant Chief
Counsel

Glenn F. Wasserman
Attorney - Advisor

David C. Shilton
Attorney - Advisor
Urban Mass Transportation
Administration
400 7th Street, S.W.
Washington, D.C. 20590

By Frank H. Santoro by D.C.A.
Frank H. Santoro
Assistant United States Attorney
P.O. Box 1824
270 Orange Street
New Haven, Connecticut 06508

Memorandum

DATE: 12 MAY 1976

SUBJECT: Grant Approval
Project No. CT-03-0016In reply
refer to:FROM : Associate Administrator for
Transit Assistance

TO : Administrator

1. Applicant - Connecticut Department of Transportation (Wethersfield Connecticut)
2. Project Description and Financing - The project consists of the following:

- | | |
|---|--------------|
| a. Acquisition of the tangible assets of the Hartford, New Haven, and Stamford Divisions of The Connecticut Company | \$10,636,450 |
| b. Acquisition of the tangible assets of the Orange Street Bus Line Company (New Haven) | 100,000 |
| c. Purchase of 118 new 45-passenger air-conditioned diesel transit buses, less tires | 7,646,400 |
| d. Purchase of 152 new 53-passenger air-conditioned diesel transit buses, less tires | 10,913,600 |
| e. Purchase of 10 new 53-passenger air-conditioned diesel suburban buses, less tires | 738,000 |
| f. Purchase of 14 supervisory automobiles | 56,000 |
| g. Purchase of 7 service trucks | 110,000 |
| h. Purchase of 413 two-way radios with 1 base station | 585,700 |
| i. Purchase of 357 registering locked fare boxes with vaults | 720,000 |
| j. Purchase of 4 spare engines, 4 spare transmissions and 24 spare air-conditioner compressors | 89,200 |
| k. Rehabilitation of the Hartford, New Haven and Stamford facilities | 800,000 |

Attachment A

1. Purchase and installation of 45 information display boards	\$ 22,500
m. Contingencies (10%) of items c thru l	\$ 2,168,140
Estimated Gross Project Cost	\$34,585,990
Revenue Financing	1,259,800
Estimated Net Project Cost	\$33,326,190
UMTA Share	\$26,660,952
Local Contribution	6,665,238

More detailed cost information and cash drawdown requirements can be found in the project budget.

No portion of the project's cost can be reasonably financed through transit revenues or private assistance, since the five year projection of revenues and expenses indicates a deficit operation. This year's deficit is estimated at \$4,801,000 and the five-year projection indicates a total of \$25,467,000. Funds to cover the deficit will be available from the General Fund of the State of Connecticut. The local share will be derived from the sale of State of Connecticut General Obligation Bonds to be repaid from the General Fund of the State. No Section 5 funds will be available for this project as they will be needed to meet the projected rail and bus operating deficit. Section 5 funds (\$40,000) will be utilized to buy 4 buses for Hartford's Elderly Transportation Program.

3. Project Evaluation

The principal mass transportation carrier in the Hartford, New Haven and Stamford urbanized areas is The Connecticut Company which operates with a fleet of 384 buses, of which 90 are owned by Conn DOT.

A. Hartford Urbanized Area

Service in the Hartford urbanized area is provided 7 days per week from 5:02 a.m. to 11:45 p.m. on weekdays and from 7 a.m. to 7 p.m. on Saturday and Sunday over 37 routes which cover 403 route miles. The Hartford Division has 217 buses, of which 191 are needed to meet peak hour requirements. Headways vary from 10 minutes during the morning peak to 90 minutes in the evening.

Ridership in Hartford is as follows:

<u>Year</u>	<u>Ridership</u>
1969	20,364,152
1970	19,201,765
1971	16,435,782
1972	12,763,709
1973	8,849,151*
1974	13,479,390
1975	16,055,303

* Note: Ridership figure for 1973 lower due to strike from November 1972 to March 1973

B. New Haven Urbanized Area

Service in the New Haven urbanized area is provided by The Connecticut Company 7 days per week from 5:00 a.m. to 12:00 p.m. on weekdays and from 7 a.m. to 7 p.m. on Saturday and Sunday over 23 routes which cover 170 route miles. The New Haven Division has 138 buses of which 90 are needed to meet peak hour requirements. Headways vary from 10 minutes during the p.m. peak to 90 minutes in the evening.

Ridership in the New Haven Division of The Connecticut Company is as follows:

<u>Year</u>	<u>Ridership</u>
1969	11,758,098
1970	11,006,691
1971	9,669,485
1972	7,548,198
1973	5,293,745*
1974	8,186,010
1975	9,280,140

In addition to the above, the Orange Street Bus Line Company provides service 6 days per week from 6:45 a.m. to 12:00 p.m. on weekdays and on Saturdays. There is one route along Orange Street which operates with 10 minute headways during the morning peak. The Company owns 9 buses of which 4 are used during the p.m. peak.

Ridership is as follows:

<u>Year</u>	<u>Ridership</u>
1970	600,720
1971	520,007
1972	501,793
1973	447,331*
1974	363,993

C. Stamford Urbanized Area

Service in the Stamford urbanized area is provided 6 days per week from 6:00 a.m. to 12:00 p.m. on weekdays and from 7 a.m. to 7 p.m. Saturday over 16 routes which cover 42 route miles. The Stamford Division has 29 buses of which 23 are needed to meet peak hour requirements. Headways vary from 20 minutes during the a.m. and p.m. peaks to 1 hour evenings and 1 hour 15 minutes on Saturday.

Ridership in Stamford is as follows:

<u>Year</u>	<u>Ridership</u>
1960	4,200,000
1966	2,200,484
1967	2,205,940
1968	2,179,862
1969	2,420,236
1970	2,871,288
1971	2,741,767
1972	2,364,641
1973	842,602*
1974	1,166,904
1975	1,380,272

The following table reflects the current and project fleet strengths by City:

	<u>Hartford</u>	<u>New Haven</u>	<u>Stamford</u>	<u>Total</u>
Conn DOT Buses	70	20	0	90
Conn Co. Buses	147	118	29	294
Orange Street Buses	0	9	0	9
Total	217	147	29	393
Current Peak Hour Needs Plus Spares (10%)	210	104	25	339
Projected 1979 Peak Hour Needs Plus Spares (10%)	245	128	35	408
Increase	35 (16.6%)	24 (23%)	10 (40%)	69 (20%)

The buses to be provided for in this project (280) will replace the oldest Connecticut Company and Orange Street Bus Line Company buses and will provide for fleet expansion (15). Due to the age and condition of the two privately-owned fleets, service is currently being provided with an excessive number of spares (54) of which 44 are permanently deadlined. All buses will be 12 or more years old at time of replacement. The 280 new buses provided under this grant will have the net effect of increasing the number of buses available for peak hour service by 69. This will amount to an increase in service of 20% for transit riders in Hartford, New Haven, and Stamford. It is anticipated that a grant will be provided next year to replace the 38 Connecticut Company buses remaining after this project is approved.

Fares are as follows:

	<u>Basic</u>	<u>Zone</u>	<u>Maximum</u>
Conn. Co.	.35	.15	.50
Orange Street	.35	-	-
E & H	.15	-	.25

The buses to be provided for in this grant will be equipped with special features to make them more accessible to the elderly and handicapped. Such features include non-skid flooring, extra vertical stanchions, and lighted stepwells. The buses will not be equipped with lifts. A companion project, CT-05-0003, which is expected to be in approvable form this fiscal year, will provide 4 12-passenger vehicles for the Hartford Elderly Transportation Program. These vehicles are for the transportation of elderly persons only. Conn DOT has indicated to us that they intend to apply for specialized vehicles for handicapped persons during the next fiscal year.

Studies affecting the elderly and handicapped in the Hartford area are currently being conducted and two alternatives have been identified: (a) the retrofitting of all the buses with lifts or (b) the purchase of 17 lift-equipped vans. Both of these alternatives are in the current Hartford TDP. It appears as if the latter alternative will be chosen. There are studies underway in New Haven and Stamford which are looking into setting up a structure to coordinate E&H services in the urban areas.

I recommend that this grant be conditioned upon the timely amendment of the Hartford, New Haven and Stamford TDPs to include special efforts to provide to the elderly and physically handicapped mass transportation service which they can effectively use, and upon submission, within twelve months, of one or more applications for capital assistance to begin implementation thereof.

In addition to the acquisition of the two companies and the purchase of 280 buses, the project calls for the rehabilitation of the bus maintenance facilities in Hartford, New Haven, and Stamford. Of the three, New Haven is in the best shape. The facility will

be altered to provide for an indoor bus washer. Stamford on the other hand will require extensive work. The building is small but old and deteriorated. Repairs to the roof and heating plant, and the addition of a bus washer comprise the bulk of the repairs. Repairs in Stamford are estimated to cost \$200,000. The Hartford facility which is much larger than Stamford will require the most work (\$500,000). While this facility is in relatively good shape, the buildings are old trolley barns and are in need of extensive repairs. In addition, two indoor bus washers will be installed. The cost estimates for this work have been reviewed by the Region I engineer and are thought to be reasonable.

The Connecticut Company has been caught up in the classic transit spiral of increasing costs and decreasing ridership. Since March 26, 1973, The Connecticut Company has been subsidized by the State of Connecticut, which is currently paying 32 percent of the operating expenses of the Company. The 1973 subsidy was \$268,000. In 1974 this rose to \$2,547,00 and in 1975 was \$5,150,000. All of the subsidy dollars came from the General Fund of the State. Because of the increasing cost of operations and the need to invest substantial sums of money to upgrade the facilities and equipment, the State came to conclusion that public ownership and operation of The Connecticut Company assets was the only viable alternative.

Subsequently, the date of March 25, 1976 was chosen as a deadline for the acquisition of the Company for it was on 12:00 p.m. of that date that both the union and operating agreements expired. A "Letter of No Prejudice" was issued by UMTA for the acquisition on February 17 and on February 18 a final offer of \$10,636,450 was made. This offer was accepted on February 23. Under terms of the conveyance documents, funds must be transferred by May 25, 1976. Management of the State-owned system will be provided by National City Management.

The acquisition of The Connecticut Company represents a significant milestone for public transportation in the State of Connecticut. The program which has been developed by Conn DOT is sound and provides all new equipment and rehabilitated facilities. New two-way radios and fare boxes and new air-conditioned buses will provide the riding public with improved public transit. Service will be increased by 20 percent further adding to the new image which Conn DOT wants to create. The approval of this project is essential to that program.

4. Legal and Administrative Criteria - The Connecticut Company is the principal mass transportation carrier in Hartford, New Haven and Stamford. Other carriers in the three urbanized areas involved include Dattco Bus Company, Beebe Transit Company, Cross County Coach, and David's Bus Line. All of these services are small and none of the service currently provided by The Connecticut Company nor that proposed by Conn DOT will affect or compete with these services.

The transportation of school children currently represents less than 10 percent of the total ridership. Conn DOT does not intend to alter that service. Conn DOT has taken a position on charter service which says that all State owned buses will be prohibited from charter service.

Other legal and administrative criteria are addressed in the attachment to this memo.

5. Recommendation - I recommend approval of this project. Funds in the maximum amount of \$26,660,952 have been reserved for this project under the contract authority provisions of the 1970 amendment to the Urban Mass Transportation Act of 1964.

The required legal and administrative findings have been made and are contained in the Project Findings and Determinations attachment herein incorporated by reference and made part of the Approval Memorandum.

Jerome C. Premo
Jerome C. Premo

Attachments

APPROVED:

Robert E. Rual

Administrator

5/12/76
Date



THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

May 19, 1977

DECISION OF BROCK ADAMS,
SECRETARY OF TRANSPORTATION,
TO MANDATE TRANSBUS

INTRODUCTION

The question before me is whether to mandate or encourage the acquisition of a low-floor, ramped bus ("Transbus") by all local transit authorities seeking federal assistance for the purchase of standard-size mass transit buses, after a certain date. Further questions include: if Transbus is mandated, what should be (i) the effective date of the mandate; (ii) the design of the bus; (iii) the federal role in introducing the bus; and (iv) the interim bus acquisition policy.

In 1971, the Urban Mass Transportation Administration ("UMTA") of the Department of Transportation ("DOT") initiated a major research project to develop an improved transit bus that would attract mass ridership, be accessible to those elderly and handicapped persons for whom the high floors and stairs of current buses provide serious obstacles and encourage continued competition among the manufacturers of transit buses. UMTA enlisted the aid of the three major domestic bus manufacturers, AM General, General Motors and the Flxible Co. (a wholly-owned subsidiary of Rohr Industries), to supply prototypes of such a bus for testing. Prototypes were built by all three manufacturers, tested by UMTA contractors and demonstrated in actual service in four cities. This process enabled the development of draft specifications for production of Transbus.

In July 1976, Robert E. Patricelli, who was then UMTA Administrator, announced that DOT would not mandate Transbus. Instead, the agency would permit the introduction of an advanced design bus ("ADB"), would mandate requirements for making buses accessible to elderly and handicapped passengers (to become effective on February 15, 1977) and would provide funds for research and development of under-the-floor components that would be needed by a low-floor bus in the future. This decision generated considerable public discussion. Many elderly and handicapped

Attachment B

groups asserted that the bus accessibility requirements were unsatisfactory. Litigation was initiated challenging UMTA's authority to fund acquisition of ADBs. Work on developing Transbus came to a virtual halt.

Shortly after I was sworn in as Secretary of Transportation in January, I took several steps to address these issues. First, I announced that the decision against mandating Transbus would be reconsidered and a public hearing on the matter would be held on March 15. Second, I waived that portion of the regulations on accessibility for the elderly and handicapped that might have been inconsistent with a future decision on Transbus, until after that decision was made. Third, I initiated new policies and procedures for the interim acquisition of ADBs. A decision on Transbus was promised by May 27.

In reviewing this matter I have had available to me the record on which former Administrator Patricelli based his decision, the transcript of the March 15 public hearing, written material subsequently submitted for the record, summaries of staff discussions with interested parties, also in the record, and, of course, the relevant statutes which I am responsible for administering.

THE DECISION

After carefully weighing the data and views submitted by manufacturers, the American Public Transit Association ("APTA"), individual transit authorities, groups representing the elderly and handicapped and others, I have decided, for the reasons stated below, to mandate Transbus. This mandate will take the form of requiring the use of a Transbus specification for all standard-size buses acquired with UMTA assistance. The mandate will apply to all procurements containing vehicle specifications approved by UMTA, issued for bid after September 30, 1979. The specifications already developed after consultation with APTA and others will be used with some minor modifications. The specifications include a requirement for a stationary floor height of not more than 22 inches, for an effective floor height including a kneeling feature of not more than 18 inches, and for a ramp for boarding and exiting.

Additionally, I have decided that DOT should encourage the formation of groups of purchasers to make the initial purchases of Transbus through advertised, low-bid competitions. Progress payments will be permitted for these initial purchases. Finally, I have decided to leave in effect the interim policy on accessibility for the elderly and handicapped. That is, manufacturers must continue to offer optional wheelchair lifts, and local transit authorities must either purchase buses with lifts or provide special services for elderly and handicapped passengers. Each of these decisions is discussed more fully below.

THE STATUTORY FRAMEWORK

In 1964, Congress responded to a growing pattern of declining ridership and increasing financial difficulties in the Nation's mass transportation systems by enacting the Urban Mass Transportation Act of 1964 (UMT Act). There have been several major amendments since 1964, and, as amended, it continues to provide the legislative basis for the federal role in urban mass transportation. Section 2 of the UMT Act states that its purposes are: to assist in the development of improved mass transportation facilities, equipment, techniques, and methods; to encourage the planning and establishment of areawide mass transportation systems needed for economical and desirable urban development; and to provide assistance to State and local governments and their instrumentalities in financing such systems.

To accomplish these purposes, sections 3 and 5 of the UMT Act authorize grants to State and local public bodies to assist in the financing of mass transportation related capital facilities including standard-size transit buses. The federal share of a capital facilities grant under section 3 is 80 percent of net project cost. Under section 5, which also authorizes payments for operating assistance, the Federal share of a capital facilities grant is a maximum of 80 percent of net project cost.^{1/}

Section 6 of the UMT Act, under which the Transbus research activities were funded, authorizes research, development and demonstration projects in all phases of urban mass transportation. Section 9 authorizes grants for urban mass transportation planning and technical studies.

A 1970 amendment to the UMT Act declared the mass transportation needs of elderly and handicapped persons to be of national importance and required DOT to exercise a special leadership role to insure that their rights were protected. This 1970 amendment added section 16 to the Act to read, in part, as follows:

SECTION 16. (a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively

^{1/} The Federal-Aid Highway Act of 1973 also authorizes capital assistance to mass transportation including assistance to acquire standard size transit buses.

utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this Act) should contain provisions implementing this policy.

Equally important, section 504 of the Rehabilitation Act of 1973 established the right of every handicapped person to be free of discrimination in any federally-assisted program. Section 504 reads:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Shortly after the adoption of section 16, DOT began implementing the legislative mandate requiring special federal leadership in the area of mass transportation for elderly and handicapped persons through written guidelines for UMTA grantees. UMTA also financed research and studies in the area. In April 1976, the earlier guidance to grantees was formalized and strengthened by the publication of UMTA's regulations on transportation for elderly and handicapped persons. These regulations set forth a comprehensive scheme of planning, service and design requirements.

DOT has long recognized that a low-floor, standard-size bus that provides access for nonambulatory and wheelchair-bound passengers would be an effective means to accommodate these several statutory mandates. The Transbus program was initiated, at least in part, to test the feasibility of such a bus. Of the methods of accomplishing accessibility that were studied and demonstrated in the Transbus program, UMTA acknowledged that the ramped Transbus emerged as the most desirable. The ramp was nonetheless not required in the specifications that were subsequently developed. The existing statutory mandates regarding transportation for the elderly and handicapped and the proven feasibility of a low-floor, ramped Transbus that will result in substantial benefits to the able-bodied as well as the disabled, argue convincingly for a Transbus mandate.

Section 16 of the UMT Act, section 504 of the Rehabilitation Act and other statutory provisions have resulted in a number of lawsuits brought by elderly and handicapped persons. Although DOT has generally been successful in that litigation, litigation success alone provides no reason to avoid or defer a federal mandate of technological improvements as they become available, especially when, as here, those improvements significantly advance the mass transportation interests of all persons, including the elderly and handicapped, and when the improvements are quite unlikely to be introduced without a federal mandate.

There is one additional statutory reason, apart from improved accessibility, for mandating Transbus. First, DOT has a statutory obligation to assist in the development of improved mass transportation facilities and equipment. Until the recent introduction of ADBs there had been essentially no change in bus design since the advent of the "new look" bus in 1959. The advanced designs presently being offered are logical intermediate steps on the way to the introduction of Transbus, and in fact, they are in part outgrowths of the Transbus program. Yet these advanced designs fall short of accomplishing one of the major goals of the Transbus program--a low-floor with attendant benefits in boarding and exiting for all passengers. Thus, a Transbus mandate will bring to fruition the full benefits of federally-assisted research and development in the area of standard-size buses.

Finally, as the transit bus market has moved to new levels of product improvement, it has become increasingly difficult to fashion procurement methods since ADBs are of somewhat different designs, with different levels of performance and, quite naturally, different prices. A Transbus mandate will provide the necessary federal leadership in the marketplace to allow transit bus manufacturers to plan investments and tooling costs around certain required minimum performance and design characteristics. This, in turn, will permit low-bid procurements that will assist in the maintenance of a viable and competitive bus manufacturing industry based upon a predictable federal policy.

THE NEED FOR A MANDATE

A review of the history of the Transbus program convinces me that simply encouraging Transbus will not result in its prompt introduction and may not result in its introduction even in the long-run. Even after approximately \$27 million of UMTA investment, all serious efforts toward producing Transbus stopped when UMTA announced in July 1976 that it would not be mandated. The history of change in bus design is not one of constant innovation. As noted earlier, the so-called "new look" bus, the one currently in use, was introduced in 1959.^{1/} ADBs will not be on the streets for another year and do not offer the advances of Transbus.

A review of the statutes that guide this decision suggests strongly that any inclination to postpone a mandate further would thwart the intent of the Congress. A review of recent litigation suggests equally strongly that the courts are also not prepared to countenance needless delay in making urban mass transit vehicles accessible to the elderly and handicapped.

Even if the Congressional and judicial concerns were not as clear as they are, I believe it is my responsibility to insure to the extent feasible that no segment of our population is needlessly denied access to public transportation. It is now within our technological capability to insure that elderly and handicapped persons are accorded access to urban mass transit buses. This access is fundamental to the ability of such persons to lead independent and productive lives. In my view, a decision assuring that access could have been made some years ago.

Today, the ADB represents the state-of-the-art in bus design from the floor up. But their floor height (even with a kneeling feature) does not make them accessible to the elderly and handicapped without a wheelchair lift. The lift is an expensive piece of hardware, principally benefiting those in wheelchairs. Many of those individuals, however, regard the lift as degrading and have expressed concern about the difficulty and safety of using it. In addition, use of the lift slows bus operations since it takes time to deploy and other passengers cannot board or exit during that time.

The low-floor Transbus can, on the other hand, accommodate a ramp. The ramp is swift to deploy and can be used beneficially by many passengers, including most categories of mobile elderly and handicapped. A low-floor, ramped bus will decrease the loading and unloading time for all passengers.

^{1/} The lack of innovation in bus design prompted a study by the National Academy of Engineering (NAE) documenting the need for an improved transit bus. The NAE study concluded that a low-floor bus was: "The most desirable means--within the existing state of the art--for improving bus transportation." The low-floor, the NAE noted, would result in a bus that was "not only . . . easy and comfortable to use, but usable readily and without embarrassment by the physically and economically handicapped, the aged, the pregnant woman, the businessman, and the young adult."

It is important to keep in mind that in discussing bus accessibility for the elderly and handicapped we are not concerned only with those confined to wheelchairs. We are concerned as well with any mobility-impaired person, a group which numbers at least 10 million. At any time there may be many other riders who are at least temporarily disabled. We cannot deny these people the rights that so many others enjoy when it is within our ability to accord them such rights.

I am acutely aware that many who are opposed to Transbus argue that it is not now within our ability to produce a low-floor, ramped bus which can operate safely and efficiently in day-to-day transit service. These objections are discussed in detail below and, in my judgment, satisfactorily refuted.

Further, a Transbus mandate does not interfere with the traditional responsibility of local officials to plan for and implement mass transportation projects. Routes, schedules and fares continue to be matters of local decision and State and local officials retain the authority to plan for and implement all transit services including specialized services where these can contribute to overall mobility needs. For those communities utilizing standard-size bus service over fixed routes, the Transbus will permit faster and more efficient bus service by minimizing the time required to take on and discharge all passengers, including those who are elderly or handicapped. Better accessibility, new styling features and a better ride will attract and retain new ridership, add to the operating revenue of transit operators and enhance the image of mass transportation in every community. Moreover, testimony at the public hearing, as well as a number of comments on the Transbus question, indicate that several communities have been and continue to be vitally interested in obtaining low-floor standard-size buses, but have been unable to do so because of the commercial unavailability of Transbus. A Transbus mandate will permit DOT to be responsive to these locally conceived mass transportation objectives, as contemplated by the UMT Act.

THE EFFECTIVE DATE OF THE MANDATE

The record of the March 15 hearing (and the hearing conducted by UMTA in 1976) contains conflicting projections of when Transbus could be ready for production. AM General indicates that Transbus could be available approximately 34 months from the date of a mandate. Flxible says 36-60 months, and General Motors says five years. These manufacturers have different views about the desirability of Transbus and the adequacy of ADBs, and their existing investments reflect these judgments.

My analysis of the entire record convinces me that all three current manufacturers could begin deliveries in 3-1/2 years. This date allows almost 2-1/2 years for development before bidding would begin, and approximately 15 months thereafter before the buses are actually delivered.

As I said in my opening remarks at the Transbus hearing, we have a very competent bus manufacturing industry and I believe competition, as well as innovation, must be encouraged. I am certain that these manufacturers can meet the challenge of producing Transbus. Additionally, I believe the pressure of effective competition among the manufacturers will result in a prompt introduction of this needed improvement. If one manufacturer is ready substantially before the effective date of the mandate, we will consider sole source procurements to get Transbus on the streets as soon as it is available.

Accordingly, as I stated above, I am ordering that all bus procurements utilizing UMTA capital assistance funds must use the Transbus specifications after September 30, 1979. I urge those manufacturers who can to make Transbus available voluntarily at an earlier date.

THE DESIGN OF TRANSBUS

In connection with the research effort to develop Transbus, UMTA developed a complete procurement document - the Transbus Procurement Requirements (TPR) - for use by local transit authorities in buying Transbuses. The document contains four parts:

- PART I : Bid Requirements/Contractual Provisions
Provides legal and other instruments for procuring coaches;
- PART II : Technical Specifications
Specifies the buses being procured;
- PART III : Quality Assurance Provisions
Specifies the minimum quality control requirements in the manufacture of the buses; and
- PART IV : Warranty Provisions
Describes the warranty coverage on the buses after their acceptance by local transit authorities.

The TPR was developed for DOT by Booz-Allen Applied Research with full participation by the APTA Bus Technology Committee, AM General, General Motors, Flxible, and UMTA. It was designed to be used by procuring agencies in competitive procurements of Transbuses under the UMTA Capital Grants Program.

It was originally intended that the Transbus prototypes developed by each manufacturer would be tested and evaluated and a winning design selected for use by all manufacturers. However, while the three Transbus manufacturers met the performance requirements for Transbus prototypes, all three used different approaches based on their individual body styling, construction and manufacturing techniques. UMTA concluded that to require all three manufacturers to build buses around one manufacturer's design would put two of the manufacturers at an unnecessary competitive disadvantage and would stifle innovation. Thus, the design specification approach was abandoned on January 8, 1975, when UMTA announced a policy which would permit all three designs to qualify for production if they met a performance specification to be developed by UMTA as a result of testing and evaluation of the prototype vehicles.

The specifications that were developed as a result of this decision nevertheless include certain design requirements such as floor height, door width, step riser height and tread depths intended to insure that accessibility goals are met. The specifications include options for features such as power plant size, air-conditioning, bus width, bus length, etc. The TPR requires every manufacturer to be able to bid on any specified combination of options in direct cost competition. The specifications are intended to be modified, from time to time, as improved components or designs are developed.

I am today adopting, with some modifications, the specifications developed and set forth in the TPR. The most important modification is the one which makes the ramp a mandatory feature of the bus. The TPR, as modified, will be available from UMTA on June 13.

In my judgment, use of this specification will promote the earliest availability of Transbus without stifling innovation in manufacture and design.

THE FEDERAL ROLE IN INTRODUCING TRANSBUS

As I indicated above, DOT has already invested approximately \$27 million in the Transbus program. As a result of that investment we have learned what is and is not technologically feasible in

connection with development of a low-floor, ramped bus. We have identified the problems of the prototype buses as well as solutions to them. We have determined which components need further development, and which are presently able to be produced. In my judgment, the \$27 million was well spent.

I am aware that costs remain in connection with going to production models of Transbus. I am convinced, however, that this type of cost should properly be borne by the manufacturers. Direct federal funding for tooling and start-up costs is not appropriate given the knowledge and experience already gained through the DOT investment. Product quality, production methods and related matters are and should be uniquely the responsibility of the manufacturer.

This would not be the case had the federal investment not already proven the underlying feasibility of Transbus. We could not reasonably require manufacturers to invest in a wholly unproven technology. But, as discussed more completely elsewhere, I am convinced the technology for Transbus is proven and consequently I believe it appropriate to require the manufacturers to put that technology into production.

There is, however, another important responsibility for the government to undertake in introducing Transbus into the marketplace. We should, I believe, do everything feasible to assure early purchases of substantial numbers of the first production Transbuses. To this end, we will encourage formation of purchaser groups to make initial procurements of Transbuses from each manufacturer through advertised, low-bid competitions. While I do not think it is appropriate to allocate the market in an effort to guarantee that each manufacturer's bus will be bought, we will permit each consortium to make initial Transbus purchases from more than one manufacturer if the consortium members so desire.

Additionally, we will agree to make progress payments in connection with these initial purchases to help defray start-up production costs. As I have already stated, we will also consider making sole source procurements of any manufacturer's Transbus which is available substantially earlier than the others.

I believe that these steps represent the maximum necessary federal role in introducing Transbus.

INTERIM ACCESSIBILITY POLICY

I am aware that even after Transbus is mandated purchases of conventional buses will continue, with UMTA financial assistance, for

slightly more than two years. Inasmuch as these newly purchased buses will continue in operation for 12 or more years, I believe it is necessary to announce the policy that we will follow concerning accessibility of mass transit for elderly and handicapped in the period before the introduction of Transbus. I have decided that our existing policy in this matter should be continued.

That policy is based on requirements that all manufacturers offer optional equipment (e.g., lifts) for loading wheelchair-bound and other handicapped passengers, and that local transit authorities must either purchase accessible buses, or provide special services suitable for transporting elderly and handicapped passengers.

Many handicapped passengers have expressed concern about the operation and safety of the lift. Additionally, the lifts are cumbersome and time-consuming to operate and will become entirely outmoded by the Transbus ramp. They do, however, make buses accessible to mobility-impaired passengers. On the other hand, many elderly and handicapped representatives oppose special services since they require advance notification or have other disadvantages not associated with regular scheduled bus service. These representatives argue that "separate but equal" transit services are inherently unequal and do not enable elderly and handicapped persons to lead the most fully integrated lives possible.

Accordingly, I believe it appropriate to allow local governments to decide how best to serve their elderly and handicapped populations until Transbus is ready for production. Those who purchase lift-equipped buses will thereby offer substantially enhanced accessibility to their elderly and handicapped citizens. Those offering special services will provide valuable experience for the period after Transbus is introduced since even fully accessible fixed route buses will not meet the transportation needs of all elderly and handicapped. DOT will carefully monitor the activities of grantees of UMTA funds to be certain that the transportation needs of elderly and handicapped citizens are being addressed.

THE TECHNOLOGICAL FEASIBILITY OF TRANSBUS

A critical factor in determining the desirability of a Federal mandate of Transbus is technological and economic feasibility. I find that a bus that meets the existing Transbus specifications, as modified to require a ramp, serves the needs of the elderly and handicapped, can be produced in a reasonable period of time and would be operationally acceptable.

Axles, tires and brakes are the most unique components of the Transbus. These components do not require technological breakthroughs, but merely enough time for proper development. The Transbus prototypes, manufactured by AM General, General Motors and Flxible, showed that in at least one instance the new axles were lightweight, used many existing internal subcomponents and can accommodate the current design automatic transmission.

Similarly, Transbus will probably require tires which are substantially smaller than those presently available. Such tires have been undergoing development for some time and could be put into production in time for Transbus deliveries. While I understand that these tires will have shorter lives than current tires, estimates of Transbus operating costs, as discussed later, include an assumption that the smaller tires will be used. In my view, any problems that the tires may cause are more than offset by the greater accessibility of the Transbus.

Transbus brakes will also be somewhat different than existing bus brakes, yet will utilize essentially the same technology. Despite the smaller diameter wheels, the Transbus specification provides for more brake area per pound of vehicle weight than on current buses. Since this specification can be met using conventional drum brakes, very little development will be required.

Several Transbus operating issues have arisen. These include road clearance, problems associated with the kneeling feature and the appropriate width of the front door. Because the Transbus prototypes experienced minor road clearance problems, the final Transbus specifications require additional road clearance. After the prototypes were tested, every observed ground clearance problem was carefully analyzed and the final specifications written so as to eliminate those problems within the limits of the prototype technology. The specifications call for road clearance equivalent to or better than that attained by all three current model buses.

Some problems have been experienced in the past with the kneeling feature found on ADBs, some current buses and Transbus. First, the earliest kneeling devices did not always operate properly. This was found to be a result of corrosion within electrical components. When greater protection for that system was provided, the problem was solved. Further, there were complaints of drivers not kneeling the bus when passengers needed it. While this remains a potential problem, it can be overcome by proper driver training. A bus that can kneel to at least 18 inches will benefit all passengers, not just those who need the ramp. These benefits far outweigh the difficulties.

The front door width called for in the specifications is 44 inches. This is wide enough to allow room for wheelchair-bound passengers or to allow for a double stream of ambulatory passengers. This feature is desired by many operators because it allows an inbound and outbound stream at the same time, thus shortening the loading and unloading time. Some operators prefer a narrow (24") door making a double stream impossible and, therefore, fares easier to collect. The productivity improvements stemming from the wide door and consequent reduced loading time should more than offset any occasional inconvenience in fare collection, and the wide door is a prerequisite to achieving accessibility. For these reasons, the narrow door option has been dropped from the specifications.

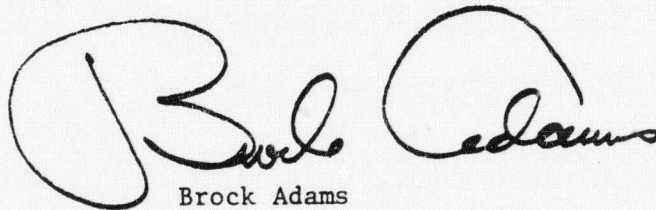
The record of the public hearing and studies done for UMTA demonstrate the efficacy of the ramp in providing access for those with mobility impairments. The Transbus specifications call for a ramp that will yield the full benefit of this technology. The specifications provide that the maximum ramp angle on a level street with no curb must not be more than 14 degrees. This means that on a level street with a six-inch curb, the ramp angle will be less than ten degrees; even with a typical crowned street and no curb, the ramp angle would be approximately 15 degrees. This is within the range in which most wheelchair-bound persons can be expected to make unassisted entry although in some cases those in wheelchairs may need assistance in exiting. These angles can be accommodated with a ramp not more than 6 feet long and a slight incline where the ramp meets the bus floor. This type of technology has already been utilized by at least one of the prototype manufacturers.

Probably the most complex feasibility questions with respect to Transbus involve its economic viability. The Transbus prototypes included spacious seating arrangements with seating capacity for 42 to 43 people as compared to the maximum seating capacity of current production buses of 51 to 53. Actually, Transbus could have a seating capacity of 47 if it is designed with that goal in mind. ADBs seat between 43-47 passengers, depending on their seat design. Therefore, I do not believe that there will be a serious loss of seating capacity. Moreover, full load capacity is more relevant in determining transit system revenues, and Transbus will have a full load capacity comparable to current buses.

A similar situation exists with regard to weight and fuel economy. The Transbus specifications require that curb weight not exceed 26,000 pounds. This weight is about 1,000 to 2,000 pounds more than current production buses but is the same as the ADB specifications. The added

weight is a reflection of the need for an additional axle and related components. Transbus reliability and maintainability have become issues as a result of the greater complexity of Transbus prototypes, especially as compared to current buses. The low-floor of the Transbus necessitates greater mechanical complexity in the running gear of the bus, but does not necessitate new or unique technology. It is important to remember that there has been no significant change in bus design in almost 20 years. It is not surprising, therefore, that those with responsibility for maintaining buses are concerned. Experience and familiarity with these changes and good product design will remedy this problem. I am, therefore, convinced that bus maintainability and reliability will not be seriously affected. Above the floor, Transbus will be similar to ADBs. We will have had considerable experience with ADBs before Transbuses are actually on the street.

Because of its greater complexity, smaller diameter tires and slightly increased weight, the Transbus will cost more than the current bus. The most reliable cost estimates indicate that, while the initial cost of Transbus will be approximately 15 to 18 percent more than current buses, this is only about five percent more than ADBs. A comprehensive analysis of cost estimates showed that the Transbus would have operating costs only about one percent higher than current buses. I conclude that these added costs are not unreasonable in light of the substantial benefits to all bus riders which Transbus will provide.

A large, stylized handwritten signature in dark ink, appearing to read "Brock Adams". The signature is fluid and cursive, with the first letter "B" being particularly large and looping.

Brock Adams
Secretary of Transportation
Washington, D.C.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1369

United Handicapped Federation,	:	
a Minnesota Non-Profit	:	
Corporation, et al.,	:	
	:	
Appellants,	:	Appeal from the United States
	:	District Court for the
v.	:	District of Minnesota
	:	
Camille D. Andre, Individually	:	
and in his official capacity	:	
as Chief Administrator of	:	
Metropolitan Transit	:	
Commission, et al.,	:	
	:	
Appellees.	:	

Submitted: February 15, 1977

Filed: June 21, 1977

Before LAY and STEPHENSON, Circuit Judges, and SMITH,*
Senior District Judge.

LAY, Circuit Judge.

This is a civil action brought by the United Handicapped Federation, the National Paraplegia Foundation, and six mobility handicapped individuals against officials of the Metropolitan Transit Commission (MTC), the Secretary of the United States Department of Transportation, the Administrator of the Urban Mass Transportation Administration (UMTA), and the AM General Corporation. The complaint alleges that the defendants failed to make urban mass transit equipment

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

Attachment C

purchased with federal financial aid fully accessible to all handicapped persons. Plaintiffs allege that the defendants have violated the Fourteenth Amendment to the United States Constitution, § 504 of the Rehabilitation Act of 1973,¹ § 16(a) of the Urban Mass Transportation Act of 1964 as amended,² §§ 105(a) and (b) of the Federal-Aid Highway Amendments of 1974,³ § 315 of the Department of Transportation and Related Agencies Appropriations Act of 1975,⁴ Minn. Stat. Ann. Chapt. 256C, and 42 U.S.C. §§ 1983 and 1985(3).

Plaintiffs originally sought preliminary injunctive relief to restrain MTC and UMTA⁵ from the purchase of 338 standard size buses which were to be used in a seven-county metropolitan area and which were not equipped to transport passengers confined to wheelchairs. The district court denied a preliminary injunction and the buses were subsequently delivered and payment made. The plaintiffs continued to seek declaratory and other injunctive relief.

On March 11, 1976, the district court, the Honorable Donald D. Alsop, granted defendants' motion for summary judgment, ruling that none of the statutes relied on by plaintiffs required that every standard size bus purchased with federal assistance be specially equipped to transport

¹29 U.S.C. § 794.

²49 U.S.C. § 1612.

³Pub.L. No. 93-643, 88 Stat. 2282.

⁴Pub.L. No. 93-391, 88 Stat. 781.

⁵UMTA was to contribute 80 per cent of the funding for the buses.

passengers confined to wheel chairs.⁶ He further held that defendants had made "special efforts" to aid the elderly and handicapped in utilization of the mass transportation system. Finding no violations of the statutes or of the Constitution, the district court stated:.

UMTA has, in accordance with the mandate of Congress pursuant to the Urban Mass Transportation (UMT) Act of 1964 as amended, 49 U.S.C. § 1601 et seq., carried on extensive research, planning, and design of mass transportation services and facilities to provide for effective utilization of mass transportation by the elderly and physically handicapped. Included in these efforts are the ongoing research and development of facilities and services, approval of grants for the purchase of vans and small buses equipped to meet the needs of the elderly and handicapped, development of the "TRANSBUS," publication of Notice of Rulemaking, and a requirement in grant approvals that the elderly and handicapped be charged reduced rates during non-peak hours.

United Handicapped Federation v. Andre, 409 F. Supp. 1297, 1299 (D. Minn. 1976).⁷

⁶At the time of the district court's opinion several other suits seeking the same or similar relief had been brought or were pending in other district courts. See, e.g., Webb v. Miami Valley Regional Transit Authority, Civ. No. C-3-75-67, (S.D. Ohio, Jan. 19, 1976); Lloyd v. Illinois Regional Transp. Authority, No. 75-C-1834 (N.D. Ill., filed Mar. 16, 1976), rev'd, No. 76-1524 (7th Cir., filed Jan. 8, 1977); and Snowden v. Birmingham-Jefferson County Transit Authority, 407 F. Supp. 394 (N.D. Ala. 1975), aff'd, No. 75-3411 (5th Cir., filed Apr. 21, 1977).

⁷The Urban Mass Transportation Act of 1964, as amended, declares it to be a national policy that:

[E]lderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped

Although Judge Alsop found that defendants were in full compliance with the "special efforts" requirements under the laws, we note that his decision was rendered prior to the issuance of UMTA regulations, in part under the authority of § 504.

Judge Alsop's opinion does not discuss whether the plaintiffs have any standing to bring a private claim for relief or whether any of the statutes place affirmative duties on the defendants. We assume the district court felt it did not have to pass on these issues since, in any event, it found that defendants had complied with the statutes.

In Lloyd v. Illinois Regional Transp. Authority, No. 75-C-1834 (N.D. Ill., filed Mar. 15, 1976), rev'd, No. 76-1524 (7th Cir., filed Jan. 8, 1977), the district court granted defendant's motion for summary judgment under a complaint similar to the one filed here. The Seventh Circuit reversed finding that § 504⁸ did place affirmative duties on the mass

7 (continued)

persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

49 U.S.C. § 1612.

⁸Section 504 of the Rehabilitation Act of 1973 provides:

No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794.

public transportation systems in that region, and that plaintiffs (who were defined as a class of mobility disabled persons in the northeastern region of Illinois) had standing to seek declaratory and injunctive relief under § 504 and regulations. See Lloyd v. Regional Transp. Authority, No. 76-1524 (7th Cir., filed Jan. 8, 1977).

Although the postures at the time of appeal of the Lloyd case and the present one appear different (in Lloyd the district court dismissed the complaint for failure to state a claim for relief; here the district court granted summary judgment on the merits), they are parallel in that all plaintiffs are denied relief. In one sense, the district court's action here is more final than in Lloyd since no further relief can be forthcoming. After reviewing the Seventh Circuit's reversal in the Lloyd case we find we must remand to the district court for reconsideration of defendants' duties under the statutes and administrative regulations and guidelines.

We adhere to the reasoning of Judge Cummings in his excellent analysis in the Lloyd appeal, and find that § 504 does create an affirmative duty on the part of these defendants. We also agree that plaintiffs do have standing to bring a private cause of action.

Subsequent to the district court's decision, regulations and accompanying guidelines were promulgated and became effective May 31, 1976. See 49 C.F.R. 609.1 - 609.25 and 613.204. One regulation provides that the UMTA administrator

will grant project approvals only if:

(a) The urban transportation planning process exhibits satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons; and

(b) The annual element of the transportation improvement program developed pursuant to 23 CFR 450.118 and submitted after September 30, 1976, contains projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semi-ambulatory capabilities; and

(c) After September 30, 1977, reasonable progress has been demonstrated in implementing previously programmed projects.

49 C.F.R. § 613.204 (emphasis added).

Guidance on the meaning of special efforts in planning is set forth in 23 C.F.R. Part 450, Subpart A, issued simultaneously with the above regulations:

The urban transportation planning process must include special efforts to plan public mass transportation facilities and service that can effectively be utilized by elderly and handicapped persons. As used in this guidance, the term "special efforts" refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, "special efforts" in planning means genuine, good-faith progress in planning service for wheelchair users and semi-ambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period.

(Emphasis added).

Examples of what affirmative duties will satisfy "special

efforts" requirements are given in 49 C.F.R. Part 613, Subpart B.⁹ In addition to these positive examples, proposed regulations of the Health, Education, and Welfare Department indicate what recipients of federal assistance may not do. See 45 C.F.R. § 84.4.¹⁰

On the basis of the record before the district court, if it were not for the subsequent promulgation of the administrative guidelines and regulations, we would agree with the district court's result. However, we feel that the denial of

⁹One example of a level of effort that will be deemed to satisfy the "special efforts" requirement is:

Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or, in the alternative, provision of a substitute service that would provide comparable coverage and service levels.

49 C.F.R. Part 613, Subpart B (Appendix).

¹⁰Under the proposed Health, Education, and Welfare Department regulations a federal assistance recipient could not, for example:

Provide a qualified handicapped person with aid, benefit, or service which is not as effective as that provided to others; [or]

.

Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving an aid, benefit or service.

45 C.F.R. § 84.4(b)(1)(ii) and (iv).

Moreover § 84.4(b)(2) would establish that:

A recipient may not provide different or separate aid, benefits or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are as effective as those provided to others.

relief to the plaintiffs cannot be justified in light of these recent definitions and guidelines. Although the buses in question here have been purchased and placed in service, because of the recent developments the defendants now have the burden to take affirmative action to conform to the regulations and guidelines. It is difficult to assess the record and the statutes in any other light.¹¹

Under the circumstances we vacate the grant of summary judgment and remand to the district court for further proceedings. The district court, upon receiving further evidence, should reappraise defendants' compliance with the statutes, regulations and guidelines, and fashion whatever equitable relief it deems necessary.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

¹¹On May 19, 1977, Brock Adams, the Secretary of Transportation, issued a decision mandating the use of a low-floor, ramped bus, "Transbus," by all local transit authorities seeking federal assistance for the purchase of standard-size mass transit buses, after September 30, 1979. In the interim the present policy on accessibility for the elderly and handicapped contained in the statutes, guidelines and regulations is to continue. Adams stated:

[M]anufacturers must continue to offer optional wheelchair lifts, and local transit authorities must either purchase buses with lifts or provide special services for elderly and handicapped passengers.

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CLEVELAND, OHIO

FILED
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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETER VANKO	)	C 76-1305
	)	
Plaintiff	)	Judge William K. Thomas
	)	
v.	)	
	)	
DALE R. FINLEY, et al.)	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

Plaintiff Peter Vanko filed this action on December 14, 1976 against defendant board members of Cuyahoga County's Regional Transit Authority (hereinafter referred to as "RTA"), then Secretary of Transportation William T. Coleman, Jr., and Robert Patricelli, Administrator of the United States Urban Mass Transportation Administration. Vanko seeks to bring the action both on his own behalf and as representative of the class of "mobility handicapped" individuals within Cuyahoga County. His complaint asks for declaratory and injunctive relief and alleges that the defendants have denied him and other similarly situated individuals access to transportation facilities provided by the RTA in violation of Section 16(a) of the Urban Mass Transportation Act of 1964, 49 U.S.C. §1612(a); Section 504

Attachment D

of the Rehabilitation Act of 1973, 29 U.S.C. §794; the Department of Transportation and Related Agencies Act of 1975, Pub. L. No. 93-391, 88 Stat. 769 (1974); and the Fifth and Fourteenth Amendments to, and commerce clause of, the United States Constitution. The complaint premises jurisdiction upon 28 U.S.C. §§1331, 1337, 1343 and 5 U.S.C. §762.

The affidavit of plaintiff Vanko states that he is confined to a wheelchair due to a birth defect and is employed by the J & B Stamping Company of Brooklyn, Ohio. Although this company is accessible by public transportation, because of his confinement to a wheelchair Vanko cannot utilize the public transit which RTA provides.

In his prayer for relief, plaintiff asks this court to enter a preliminary injunction enjoining the defendants from taking any action toward the purchase of any mass transit vehicles; to issue a declaratory judgment that the Regional Transit Authority is currently being operated in violation of federal statutory and constitutional provisions; to permanently enjoin defendant RTA board members from operating the RTA in a manner which does not assure effective utilization of the system by the mobility handicapped; and to permanently enjoin defendants Coleman and Patricelli from releasing federal funds to RTA until the system is operated so as to provide for effective utilization by the handicapped.

The injunctive prayers for relief are specifically aimed at preventing the release of federal funds to RTA under the terms of a July 28, 1976 RTA application to the Urban Mass Transit Administration for federal financial assistance. This application requests federal funds of \$99,547,200 as part of a capital improvements plan totaling \$124,434,000.

Both the defendant board members of the RTA (hereinafter the "local defendants") and Secretary Coleman and Administrator Patricelli (hereinafter the "federal defendants") have moved to dismiss the complaint or, in the alternative, for summary judgment, and plaintiff has submitted a brief in opposition to these motions. The motions will now be considered and will be treated as motions for summary judgment, since matters outside the pleadings have been submitted to, and considered by, the court in ruling on the motions.

I.

Neither set of defendants have challenged plaintiff's authority to bring this lawsuit. The court at the outset finds that the plaintiff, Peter Vanko, has standing to bring this action pursuant to Section Ten of the Administrative Procedure Act, 5 U.S.C. §702, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Bartels v. Biernat, 405 F.Supp. 1012 (E.D. Wis. 1975), and that he also has an implied right of action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Lloyd v. Regional Transit Authority, 548 F.2d 1277 (7th Cir. 1977). The court, therefore, need not, at this

point, decide whether plaintiff can maintain a private right of action based upon the other statutes and constitutional provisions relied upon in the complaint.

Although the defendants do not challenge plaintiff's authority to bring this action, the local defendants contend that the court is precluded from entertaining this lawsuit at this time because of the doctrine of primary jurisdiction. This defense was originally based on the theory that the federal government had not yet acted upon RTA's grant application and that the completion of federal administrative action is a prerequisite to judicial consideration of this lawsuit. The court has been informed by Mr. Arthur Fitzgerald, Chief Assistant General Counsel of RTA, that federal approval of at least a portion of RTA's grant application has¹ been obtained since the briefing of the motion at issue. Since the Urban Mass Transportation Administration has acted on the RTA request for federal funding for purchases of additional rolling stock (disagreement over such purchases being the crux of the parties' dispute in this lawsuit), the court concludes that it has jurisdiction to entertain the

1. According to Mr. Fitzgerald, the federal government approved a grant of \$55,108,280 to RTA on January 12, 1977. This approval included federal financing for the purchase of one-hundred and sixty-five buses, thirty special vehicles for the handicapped and elderly, and seventy-five heavy and light rapid transit cars. The remainder of the \$99,547,200 request has not been acted upon, pending the completion of engineering studies.

action at this time. See also Lloyd v. Regional Transportation Authority, supra, at 1287.

A second procedural defense raised by the local defendants is that the plaintiff has failed to join the Regional Transit Authority as a party defendant and that the RTA is an indispensable party for the purposes of Rule 19 of the Federal Rules of Civil Procedure. The court agrees with these defendants that the RTA as a corporate body should be joined as a defendant to this lawsuit. This does not mean, as the local defendants argue, that plaintiff's lawsuit must be dismissed for failure to sue RTA. The court instead orders, pursuant to Rule 19(a), that the RTA in its corporate capacity be joined as a party defendant.

The final procedural objection the local defendants raise to plaintiff's complaint is that the RTA board members are named as defendants in both their official and individual capacities, while the facts asserted in, and prayer for relief of, the complaint concern only actions of the RTA and its board members in their official capacities. Since this is the case, and since the relief sought is solely equitable and of a character which only the corporate body of the RTA can furnish, the complaint is ordered dismissed as against the RTA board members in their individual (but not official) capacities.

II.

A.

The non-procedural aspects of defendants' motions for summary judgment will now be considered. Plaintiff's

first claim for relief is premised upon the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601, et seq., and, more specifically, upon Section 16(a) of that act, 49 U.S.C. §1612(a), which provides:

(a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

Plaintiff contends that the "special efforts" mandated by this section require the defendants "to act so as to ensure that all transit rolling stock and facilities can be effectively utilized by all mobile disabled and elderly people." The defendants' position is that neither the Urban Mass Transportation Act nor the other statutory or constitutional provisions relied upon by plaintiff require "that every regular route vehicle must be accessible to every person with a mobility handicap, including those who must ambulate by wheelchair". The defendants instead contend that they have met the act's requirement of "special efforts" by the institution of several programs and policies designed to benefit the handicapped and elderly, such programs being collectively entitled Community Responsive Transportation (CRT).

This court cannot accept plaintiff's broad reading of 49 U.S.C. §1612. To the contrary, the court specifically rejects plaintiff's contention that this statutory provision requires that "all transit rolling stock and facilities [must be able to be] effectively utilized by all mobile disabled and elderly people."² Leary v. Crapsey, Civil No. 76-286 (W.D. N.Y. Mar. 31, 1977); Young v. Coleman, Civil No. H-76-201 (D. Conn. Dec. 17, 1976); United Handicapped Federation v. Andre, 409 F.Supp. 1297 (D. Minn. 1976); Snowden v. Birmingham - Jefferson County Transit Authority, 407 F.Supp. 394 (N.D. Ala. 1975), aff'd (5th Cir. April 21, 1977); Bohlke v. Golden Gate Bridge, Highway, and Transportation District, No. 73362 (Marin County, California Superior Court, May 9, 1975). In establishing a national policy to guarantee mass transit utilization rights for the handicapped,

2. On May 19, 1977 Secretary of Transportation Brock Adams ordered that all buses bought with Department of Transportation funds after September 30, 1979 must conform to the Department's "Transbus" prototype specifications. One of these specifications requires a ramp suitable for wheelchair boarding. Buses of such design are not now commercially available and the court therefore finds that the Secretary's decision has no direct bearing on this case. See May 19, 1977 Decision of Brock Adams, Secretary of Transportation, to Mandate Transbus.

Congress did not create immediate rights of access for all
handicapped individuals to all mass transit facilities.³

The plaintiff has left uncontroverted RTA's estimate that a fully accessible transit system would require \$66,800,000 in capital expenditures and an additional

3. Although such universal accessibility was undoubtedly the goal of the 1970 Urban Mass Transportation Act amendment, Congress was certainly cognizant of the technological and economic problems which immediate requirement of universal accessibility would create. See 41 Fed. Reg. 18236 (April 30, 1976) (wherein it is stated that "no manufacturer of full-size transit buses presently offers a lift or a ramp option for its buses..."), May 19, 1977 Decision of Brock Adams, *supra*, pp. 7-8 (wherein the Secretary found it will be three and one-half years before deliveries of the ramp-equipped Transbus can begin). Congress's mandate that mass transit systems undertake "special efforts" for the elderly and handicapped is therefore a dynamic, rather than a static, requirement, the specific contours of which can only be defined by the state of mass transportation technology at any particular moment. Since the plaintiff has not rebutted the defendants' showing of the economic infeasibility of universal access (and has not cited the court to any evidence that a universally accessible transit vehicle is currently technologically feasible), Section 16(a) of the Urban Mass Transportation Act does not now, in 1977, require universal accessibility.

The Secretary of Transportation recently addressed the question of the DOT's accessibility policy prior to September 30, 1979 (after which date all buses must conform to DOT's "Transbus" prototype and contain wheelchair accessibility ramps):

...I believe it appropriate to allow local governments to decide how best to serve their elderly and handicapped populations until Transbus is ready for production. Those who purchase lift-equipped buses will thereby offer substantially enhanced accessibility to their elderly and handicapped citizens. Those offering special services will provide valuable experience for the period after Transbus is introduced since even fully accessible fixed route buses will not meet the transportation needs of all elderly and handicapped.

May 19, 1977 Decision of Brock Adams, *supra*

The court notes that much of the legislative history cited by plaintiff is not inconsistent with this footnote's interpretation of 49 U.S.C. §1612(a): an interpretation of "special efforts" that requires integration of many of the nation's mobility handicapped into mass transit systems at once, and eventual integration of wheelchair users into these systems when technology permits.

\$10,880,000 per year in increased operating expenses (the total cost of operation of RTA's bus and rapid transit systems in 1976 was \$40,150,000). Expenditures of this magnitude for an estimated 1,700 to 8,600 persons confined to wheelchairs are not required by Section 16(a) of the Urban Mass Transportation Act, when, as in this case, adequate transit services for all persons in Cuyahoga County

4. These figures are taken from the June 2, 1976 statement of Leonard Ronis, RTA's general manager, to the House Public Works Committee, which is Attachment D to Appendix E of the federal defendants' brief. Mr. Ronis also told the House Committee that RTA estimates there are approximately 1,700 potential transit users confined to wheelchairs in the Cleveland area, of whom 200 to 250 would probably utilize a fully accessible RTA on a daily basis. Attachment C to Appendix E refers to the Harvard Report on Community Responsive Transit which estimated that 8,600 persons confined to wheelchairs might use a specialized transit system for the handicapped (this estimate, however, was based on national averages rather than a local population analysis). Even taking the Harvard figures on potential users, the additional cost of total accessibility would be \$1,265 per year per potential user and \$7,767 per user for the required capital outlay. If RTA's own figures on estimated actual (rather than potential) users are accepted, the costs per user soar to \$43,520 to \$54,400 per year and \$267,200 to \$334,000 in capital expenditures.

Defendants further point out in their briefs that wheelchair users might not be able to take advantage of a fully accessible bus system during the winter months when snow covers Cuyahoga County sidewalks and streets. Any such problems in getting from one's home to the bus are minimized by CRT's door-to-door service.

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can apparently be provided at a fraction of such cost. Although the court is cognizant of the psychological and rehabilitative benefits to be gained from integrating wheelchair users into the regular transit system, the Regional Transit Authority is only required to provide mass transit that the handicapped and elderly can "effectively utilize". The court, therefore, holds that there is no statutory infirmity in RTA's basic approach to Section 16(a) special efforts compliance (the operation of a separate paratransport system parallel to the main bus and rapid systems).
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B.

Although the court rejects plaintiff's argument that the Urban Mass Transportation Act of '64 requires that all rapid transit vehicles must be universally accessible, it nevertheless feels that on the present record summary judgment for the defendants is inappropriate. However, as hereafter explained, the court reserves final ruling on the defendants' motions pending augmentation of the record

5. Assuming that RTA has a limited amount of money with which to work, expenditures of the magnitude necessary to create a fully accessible transit system not only mean that there will be less money for the general transit system, but also that RTA will not be able to provide as complete services as it might otherwise be able to for the elderly and handicapped who are not confined to wheelchairs. Such possible conflicts of interest among the mobility handicapped must, of course, be addressed by this court in any eventual consideration of Peter Vanko's request for class certification of his lawsuit.

6. Although defendants are not on this record required to make all RTA buses accessible to wheelchair users, any new buses ordered will be accessible to most other elderly and handicapped persons who are not confined to wheelchairs. See 49 C.F.R. §609.15.

and submission of supplemental briefs. Two issues left unresolved on this record are whether the RTA is required by the applicable federal statutes to provide service for elderly and handicapped individuals "that is reasonable by comparison with the service provided to the general public" and whether, if it is required to provide comparable service, it is in fact meeting such requirement.⁷ The briefs submitted to this court, as well as all of the cases cited to the court, focus on the question of whether or not RTA must make all of its vehicles fully accessible and have not considered in any depth the extent to which federal statutes may require comparable, but non-integrated, transit services for the wheelchair confined and other handicapped and elderly individuals. The court, therefore, orders the parties to submit to the court supplemental briefs on this legal issue, as well as any affidavits or other documentation that bears on the comparability of services provided by RTA's Community Responsive Transit and RTA's general transit services. Such

7. This quotation is taken from the definition of Section 16(a) "special efforts" contained in the appendix to the Urban Mass Transportation Planning regulations implementing the 1964 Urban Mass Transportation Act. 41 Fed. Reg. 18236 (April 30, 1976).

8. The parties are also requested to address the issue of what this court's scope of review should be if it determines that comparability is required between mass transit services for the handicapped and the general public. See e.g., Kendler v. Wirtz, 388 F.2d 381 (3d Cir. 1968); Pullman Incorporated v. Volpe, 337 F.Supp. 432 (E.D. Pa. 1971).

information should include current data on the coverage of CRT both in terms of the area in which the program is in effect and the hours and days per week of its operation.⁹ These further submissions should be made to the court within twenty days from the date of this memorandum and order.

C.

Plaintiff has also claimed relief against local and federal defendants under the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., the Department of Transportation and Related Agencies Act of 1975, Pub. L. No. 93-391, 88 Stat. 769 (1974), and the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution. Since ruling is reserved on the defendants' motions for summary judgment, it is unnecessary to discuss plaintiff's claims under these other statutory and constitutional claims at length. The separate provisions will now be considered briefly, however.

The Rehabilitation Act claim of plaintiff is based upon 29 U.S.C. §794, which provides that:

9. The parties should also try to assess CRT in light of the examples of "special efforts" programs contained in the appendix to 49 C.F.R. §613.204.

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

As to this statutory claim, the court adopts the reasoning of Part II.B. of this opinion and finds that the same issue remains unresolved under the Rehabilitation Act of 1973 as under the Urban Mass Transportation Act of 1964: i.e., whether RTA is required to provide services for the elderly and handicapped which are reasonably comparable to the services provided the general public and, if such a requirement exists, whether RTA is in compliance with it. The court, however, specifically rejects the plaintiff's contention that the Rehabilitation Act of 1973 or the regulations promulgated thereunder¹⁰ require the defendants to¹¹ make all RTA buses accessible to wheelchairs.

10. These include regulations promulgated by H.E.W., 42 Fed. Reg. 22675 (May 4, 1977) (which are inapplicable in this case, but instructive) and the UMTA regulations promulgated upon the authority of both the Rehabilitation Act of 1973 and the Urban Mass Transportation Act, 49 C.F.R. §609.1 et seq.

11. Both sets of defendants have cited *Young v. Coleman*, supra, to support their contention that the Rehabilitation Act of 1973 does not require all buses to be wheelchair accessible. Their briefs specifically quote that opinion's citation of 29 U.S.C. §792(c)(1)(A), which is also a part of the 1973 Rehabilitation Act:

"The [Transportation Barriers Compliance Board] shall also...determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems... (Emphasis added)."

The court agrees with the defendants that this provision is evidence that Congress did not intend the Rehabilitation Act to require that all handicapped individuals be fully integrated into main-stream mass transit systems. The court notes, however, the Rehabilitation Act Congress's interest in providing adequate transportation for gainfully employed handicapped individuals.

Plaintiff's third claim for relief is based upon the Department of Transportation and Related Agencies Act of 1975, Pub. L. No. 93-391, 88 Stat. 769 (1974), Section 315 of which provides:

SEC. 315. None of the funds provided under this Act shall be available for the purchase of passenger rail or subway cars, for the purchase of motor buses or for the construction of related facilities unless such cars, buses and facilities are designed to meet the mass transportation needs of the elderly and the handicapped.

This section of the appropriations bill is of no benefit to plaintiff, however, since it only restricts the allocation of funds under that particular allocations act. In this 1974 act, Congress only appropriated money for the fiscal year ending June 30, 1975 and thus RTA cannot now receive funds from this 1974-75 appropriation.¹² Thus, defendants are not in violation of Pub. L. No. 93-391, and plaintiff's claim, insofar as it is based on this act, is ordered dismissed.

Since the enactment of this 1974 legislation, Congress has passed two other appropriations acts to fund the Department of Transportation for the fiscal years ending June 30, 1976 and June 30, 1977. Pub. L. No. 94-134, 89 Stat. 695 (1975); Pub. L. No. 94-387, 90 Stat. 1171 (1976). Neither of these acts have language similar to the 1974-75

12. Plaintiff nowhere contends in his complaint, briefs, or affidavit that the funds in question stem from this 1974-75 appropriations bill.

appropriations bills, and thus they too are of no help to
13
plaintiff.

Plaintiff's fourth and final claim for relief is constitutional in nature, based upon the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the privileges and immunities clause of the Fourteenth Amendment to the Constitution, and the Constitution's commerce clause. These constitutional provisions are held to add nothing to the plaintiff's cause of action. The mandate of "special efforts" imposed upon defendants by statute is a higher standard than
14
any which these constitutional provisions might require. Any protection which these constitutional provisions might provide are satisfied by RTA's Community Responsive Transit efforts for the elderly and handicapped as they are described in the pleadings, briefs, and affidavits filed with the court. Leary v. Crapsey, supra; Young v. Coleman, supra; United Handicapped Federation v. Andre, supra; Snowden v. Birmingham-Jefferson County Transit Authority, supra; Bohlke v. Golden Gate Bridge, Highway and Transportation District, supra.

13. The only mentions of the handicapped and elderly in these most recent bills require as a condition for mass transit grants that the grant recipient establish special fare structures for these groups (RTA is in compliance with these requirements). 90 Stat. 1171, 1186 (\$315), 89 Stat. 695, 711 (\$314). Thus the deletion of the broad language of the 1974 legislation in the 1975 and 1976 appropriations bills stemmed not from mere inadvertance but was a conscious decision on the part of a Congress which decided to deal with the problems of the handicapped and elderly in a less sweeping, more focused, manner.

14. Mr. Justice Brennan has written in a plurality opinion that physical disability is not a suspect classification for equal protection purposes. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (dictum).

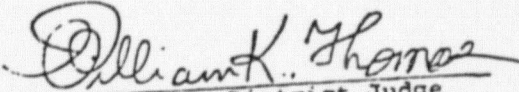
As the Supreme Court has said in another context:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill... Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.

Lindsey v. Normet, 405 U.S. 56, 74 (1972). For the plaintiff to prevail he must, therefore, succeed on the statutory, rather than constitutional, bases of his complaint.

In accordance with the above opinion, decision on the defendants' motions is reserved pending further briefing and augmentation of the record.

IT IS SO ORDERED.


United States District Judge

DEPARTMENT OF TRANSPORTATION

CERTIFICATE OF TRUE COPY

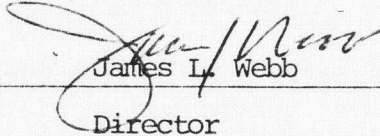
I HEREBY CERTIFY that the attached { is a true copy } of the original
~~attached copies~~

Letter to Mr. James F. Shugrue, Commissioner, State of Connecticut, Department of Transportation, 24 Wolcott Hill Road, Wethersfield, Connecticut, from Jerome C. Premo, pertaining to Project No. CT-03-0016,

on file in the Office of Administration, Urban Mass Transportation Administration, U. S. Department of Transportation.

Signed and dated at Washington, D. C.

this 6th day of July, 19 77

by 
James L. Webb

Director

(Title)

I HEREBY CERTIFY that James L. Webb

who signed the foregoing certificate is now, and was, at the time of signing Director of Administrative Services, Urban Mass Transportation Administration, Department of Transportation,

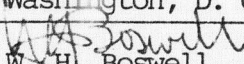
and that full faith and credit should be given his certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed
my name and caused the seal of the Department of

Transportation to be affixed this Sixth

day of July, 19 77

at Washington, D. C.


W. H. Boswell

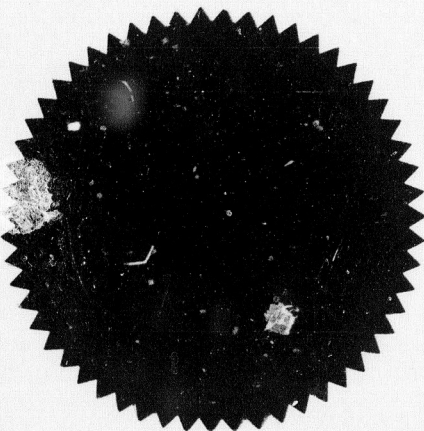
(Signature)

Associate Administrator for Administration

(Title)

Urban Mass Transportation Administration

Department of Transportation





DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

JUN 27 1977

Mr. James F. Shugrue
Commissioner
State of Connecticut
Department of Transportation
24 Wolcott Hill Road
P.O. Drawer A
Wethersfield, Connecticut 06109

Dear Mr. Shugrue:

This is in response to your letter of May 19, 1977 in which you set forth certain information to demonstrate that special efforts for the elderly and handicapped are being made in the New Haven and Stamford urbanized areas.

As you know, on May 12, 1976 ConnDOT's application for assistance under section 3 of the Urban Mass Transportation Act (Project No. CT-03-0016) was approved in the amount of \$26,660,952 for the purpose of acquiring the assets of the Connecticut Company and purchasing 280 new standard-size transit buses. The grant of assistance was expressly conditioned upon the TIPs for the three urbanized areas being amended in a timely fashion to include projects or project elements that evidence special efforts for the elderly and handicapped and upon the submission of one or more applications for assistance to begin implementing such TIP amendments within 12 months of the grant approval. This express condition was made part of the grant contract which was executed on May 14, 1976.

Twelve months have passed and the TIP for New Haven and Stamford has not been amended; neither has ConnDOT applied for any assistance to improve the state of mass transportation for the elderly and handicapped in these two urbanized areas. The TIP for Hartford, submitted to UMTA on September 30, 1976 and amended in March 1977, on the other hand, was found to demonstrate that a good faith effort is being made to comply with the spirit of the special condition contained in the grant contract.

Attachment E

Your letter of May 19, 1977 suggests that certain steps are now being taken to comply with the special condition in New Haven and Stamford as well. You state that the TIP for New Haven will include a project to provide \$300,000 for operating assistance for a "coordinated door-to-door handicapped service", and that this amount represents approximately 15% of the section 5 apportionment for the New Haven urbanized area. UMTA's regulations on Transportation for Elderly and Handicapped Persons do, in fact, contain an example of a satisfactory level of special effort that relates to an expenditure equivalent to 5% of the section 5 apportionment. However, that expenditure must be for projects specifically benefitting wheelchair users and those with semiambulatory capabilities. The TIP, therefore, should identify the amount of funds specifically devoted to serving the transportation needs of such persons if you intend to satisfy the "special efforts" requirement in this manner.

Similarly, you state that the TIP for Stamford will include a project for the purchase of three lift-equipped small buses for service in a demand-responsive operation. The TIP should explain how this project satisfies the "special efforts" requirement; i.e., whether the cost (or that part of the cost which can be said to specifically benefit wheelchair users and other semiambulatory persons) approximates 5% of the Governor's section 5 apportionment for Stamford, whether it assures every wheelchair user or semiambulatory person in the Stamford area ten round-trips per week at fares comparable to those charged to users of standard transit buses, etc.

Without such clarification, it is not possible to ascertain whether the efforts described in your letter adequately meet the requirements of UMTA's regulations, and, hence, the spirit of the special condition contained in the grant contract for Project No. CT-03-0016. We expect that such clarification will appear in the forthcoming TIP.

Until we receive that TIP, however, we cannot say that the special condition has been met. Therefore, pending receipt of the next TIP for New Haven and Stamford, no funds for the buses to be purchased under Project No. CT-03-0016 will be released by UMTA.

When the TIP is submitted it will be reviewed for sufficiency in this area and a decision will be made at that time whether the projects programmed for the urbanized areas in question satisfy the "special efforts" requirement of UMTA's regulations with respect to wheelchair users and semiambulatory persons, and thus satisfy the spirit of the special condition contained in the contract. Assuming that the TIP is found to meet all applicable requirements, we expect that you will submit applications for the projects designed to benefit the elderly and handicapped as soon as possible. Once the applications are submitted, we will then be in a position to release the funds under Project No. CT-03-0016.

My staff and I are available to assist you in these matters.

Sincerely,

Jerome C. Premo

Jerome C. Premo
Associate Administrator
for Transit Assistance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of July, 1977, I served the foregoing Brief for the Federal Defendants-Appellees, by mailing copies postage prepaid to:

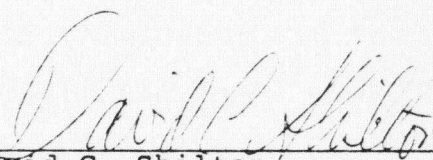
David C. Shaw, Esquire
Legal Aid Society of Hartford
County, Inc.
85 Laurel Street
Bristol, Connecticut 06010

John J. Langenback, Esq.
41 Lewis Street
Hartford, Connecticut

Joan E. Pilver, Esquire
Legal Aid Society of Hartford, Inc.
525 Main Street
Hartford, Connecticut 06103

Frank Santoro, Esq.
U.S. Attorney
P.O. Box 1824
New Haven, Connecticut 06508

Robert Pelgrift
Assistant Attorney General
24 Wolcott Hill Road
Wethersfield, Connecticut



David C. Shilton
Attorney - Advisor